83 - 1513

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

v.

TIMOTHY CURRAN,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the California "public accommodations" statute unconstitutionally (a) interfere with the rights to freedom of association and privacy, and (b) contravene the Supremacy Clause when applied by the California courts to prohibit the Boy Scouts of America—a congressionally chartered, private, charitable membership association devoted to instilling in boys certain beliefs, skills, morals and other values—from denying voluntary, adult leadership positions to avowed homosexuals.

2. Does the California common law right to "fair procedure" unconstitutionally (a) interfere with the rights to freedom of association and privacy, and (b) contravene the Supremacy Clause, when interpreted by the California courts to preclude the Boy Scouts of America from expelling a member from voluntary, adult membership because he is an avowed homosexual.*

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* In accordance with Supreme Court Rule 28.1, counsel certifies that the Boy Scouts of America may be considered the "parent" of the appellant, and all other councils of the Boy Scouts of America may be considered "affiliates."

In accordance with Supreme Court Rule 28.4(c), appellant notes that, because the constitutionality of a state statute is drawn into question in a case in which the State is not a party, 28 U.S.C. § 2403(b) may be applicable.

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JURISDICTIONAL STATEMENT

Appellant requests that the Court accept jurisdiction of this appeal and reverse the judgment below.

OPINIONS BELOW

The opinion of the Superior Court of California sustaining the Boy Scouts' demurrer to the original complaint and dismissing the complaint with leave to amend (App. C) is unreported. The subsequent opinion of that court sustaining the demurrer to the amended complaint

and dismissing the complaint without leave to amend (App. B) is also unreported. The opinion of the California Court of Appeal, Second Appellate District, (App. A) is reported at 147 Cal. App. 3d 712, 195 Cal. Rptr. 325. No opinion accompanied the denial of a hearing by the Supreme Court of California (App. E).

JURISDICTION

This appeal arises out of a suit brought by Timothy Curran against the Mount Diablo Council of the Boy Scouts of America. Seeking a writ of mandate and damages, Curran alleged (1) that the Council's decision to expel him from the Boy Scouts was based on his avowed homosexuality, and (2) that his expulsion on that ground violated both California's "public accommodations" statute, known as the "Unruh Act," and a California common law right to fair procedure.

The Council demurred, arguing, *inter alia,* that if the Unruh Act and the common law doctrine were interpreted to prohibit the Council from adhering to the Boy Scouts' membership policy, they would violate the First Amendment freedom of association, the constitutional right of privacy and, by interfering with the Boy Scouts' federal statutory charter, the Supremacy Clause of the United States Constitution. The Superior Court sustained the demurrer and ordered the complaint dismissed. (App. B)

Curran appealed, and the Court of Appeal reversed. Expressly rejecting the Council's contention that acceptance of Curran's claims would violate the United States Constitution, the court concluded that Curran's exclusion or expulsion from the Boy Scouts because of his avowed homosexuality violated the Unruh Act and California common law. (App. A) The Council filed a timely peti-

tion for rehearing, reasserting its constitutional objections. The petition was denied on November 2, 1983. (App. D)

On November 14, 1983, the Council filed a timely petition for hearing in the California Supreme Court, again arguing that the statute and common law doctrine, as construed by the Court of Appeal, violated the United States Constitution. The Supreme Court, without opinion, denied the petition on January 6, 1984. (App. E) On February 10, 1984, the Council filed with the California Court of Appeal a notice of appeal to this Court. (App. F)

This case is properly before this Court on appeal. Under 28 U.S.C. § 1257(2), this Court has jurisdiction over appeals from (1) a final decree, (2) rendered by the highest court of a state in which review may be had, (3) in which a state statute is upheld in the face of a claim that it is repugnant to the United States Constitution. This appeal meets each part of that jurisdictional test.

First, the appeal is from a "final" decree, as that term has been applied by this Court. *Southland Corp. v. Keating,* ___ U.S. ___, ___, 52 U.S.L.W. 4131, 4133 (January 23, 1984); *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469, 482-87 (1975). The California courts will treat the federal issues as finally resolved and in any future proceedings will not review further the federal constitutional questions posed by the Court of Appeal's application of the Unruh Act and the common law doctrine to the Boy Scouts. Under California law, the Court of Appeal's decision rejecting the federal objections is binding between the litigants and will be treated on any subsequent appeal as the "law of the case," even by the California Supreme Court. *Bigbee v. Pacific Telephone & Telegraph Co.,* 34 Cal.3d 49, 665 P.2d 947, 192 Cal. Rptr.

857, 861 & n.11 (1983); *Price v. Civil Service Commission,* 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475, 481 n.5, *cert. dismissed,* 449 U.S. 811 (1980); *Davies v Krasna,* 14 Cal. 3d 502, 535 P.2d 1161, 121 Cal. Rptr. 705, 708 & n.4 (1975).

Theoretically, the Council, after trial, could "prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." *Cox Broadcasting, supra,* 420 U.S. at 482. But if the Council's constitutional objections are valid, "there should be no trial at all." *Id.* at 485. Because these objections go to the legitimacy of the litigation itself, the Court now has jurisdiction to review the state courts' final rejection of the federal constitutional defenses. *Id.* at 482-83.

If the judgment below is not reviewed, the determination rendered by the Court of Appeal will guide the entire California court system. Because the California Supreme Court declined to hear the case, the California courts will treat the Court of Appeal's decision as "settling the law" unless and until the state Supreme Court explicitly rules otherwise. *Housing Authority of Los Angeles v. Peters,* 120 Cal. App. 2d 615, 261 P.2d 561 (1953); *accord Scott v. E.L. Yaeger Construction Co.,* 12 Cal. App. 3d 1190, 91 Cal. Rptr. 232, 234-35 (1970); *In re Henley,* 9 Cal. App. 3d 924, 88 Cal. Rptr. 458, 462 (1970); *see generally* 5 Cal. Jur. 3d. § 435 at 46 (1973). All private membership organizations in California will have to operate "in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Cox Broadcasting, supra,* 420 U.S. at 486. Furthermore, as at least one intervening decision already illustrates (*see* p. 24, *infra*), the decision below may guide courts and agencies in other states in interpreting their "public accommodations" statutes. Failure to accept

jurisdiction at this juncture, therefore, will "seriously erode" fundamental federal policies. *See Cox Broadcasting, supra,* 420 U.S. at 483, 486; *Southland Corp. v. Keating, supra.*

Second, because the California Supreme Court declined discretionary review, "the court of appeal was shown to be the highest court of the state in which a decision could be had." *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923); *accord Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *see also Press-Enterprise Co. v. Superior Court,* ___ U.S. ___, 52 U.S.L.W. 4113, 4114 (January 18, 1984) (reviewing decision of the California Court of Appeal after hearing was denied by the California Supreme Court).

Third, jurisdiction by way of appeal rather than by certiorari exists when, as here, the decision below upheld a state statute in the face of a claim that the statute was unconstitutional as applied. *Japan Lines, Ltd. v. County of Los Angeles,* 441 U.S. 434, 441 (1979); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 289-90 (1921). The Council's challenge below was directed to the State's "power to enact [the Unruh Act] as it . . . is made to read by construction." *Jett Brothers Distilling Co. v. Carrollton,* 252 U.S. 1, 6 (1920). The Court of Appeal specifically considered whether interpretation of the Unruh Act to prohibit the Council's actions rendered the statute repugnant to the Constitution, and decided that it did not. App. 16a-19a, 21a-22a; *see Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945). The decision, therefore, falls within the appeal jurisdiction conferred by Section 1257(2).

The second question presented—the constitutionality of applying California's common law right of "fair procedure" to prohibit expulsion of avowed homosexuals from adult leadership positions in the Boy Scouts—arises in the same procedural posture and raises the same constitutional issues as does the challenge to the Unruh Act. Because this issue would separately come within the Court's certiorari jurisdiction, 28 U.S.C. § 1257(3), the Court may review the issue as part of an appeal otherwise properly before the Court. *See Cox Broadcasting, supra,* 420 U.S. at 487.

STATUTES INVOLVED

1. The Boy Scouts Charter enacted by Act of Congress in 1916 provides in relevant part:

> "The name of the corporation created by this chapter shall be 'Boy Scouts of America,' and by that name it shall have perpetual succession, with power . . . to make and adopt by-laws, rules, and regulations not inconsistent with the laws of the United States of America, or any State thereof, and generally to do all such acts and things (including the establishment of regulations for the election of associates and successors) as may be necessary to carry into effect the provisions of this chapter and promote the purposes of said corporation." 36 U.S.C. § 22.

* * *

> "The purpose of the corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do

> things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U.S.C. § 23.

2. California Civil Code § 51 (the "Unruh Act") provides in relevant part:

> "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

STATEMENT

1. The Boy Scouts of America is a voluntary, private, charitable membership organization chartered by Congress in 1916

> "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, *and to teach them patriotism, courage, self-reliance, and kindred virtues* . . . ." 36 U.S.C. § 23 (emphasis added).

The California courts now have held that state law prohibits the Boy Scouts from concluding that it can best promote these objectives if avowed homosexuals do not serve in voluntary adult leadership positions within the Boy Scouts.

The Boy Scouts' Charter makes clear that its program rests on a foundation of particular fundamental values and beliefs.[1] The Charter specifies in Article I, Section 2, that "emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development . . . ." In addition, the Charter declares that, although the organization is "absolutely nonsectarian," it is the belief of the Boy Scouts "that no member can grow into the best kind of citizen without recognizing an obligation to God." (Art. IX, § 1, cl. 1). The Scout Oath accordingly requires each Scout to subscribe to a commitment to do his "duty to God and my country" and to keep himself "morally straight." (Rules Art. IX, § 1, cl. 3). The Scout Law specifies that, while the Scout "respects the beliefs of others," he is to be "reverent toward God" and faithful to his religious duties; he "keeps his . . . mind . . . clean" and "goes around with those who believe in living by these same ideals." *Id.*

The Charter also specifies that no person "shall be approved as a leader" in the Boy Scouts

> "unless, in the judgment of the [Boy Scouts], that person possesses the *moral,* educational, *and emotional qualities* deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require." Art. VIII, § 1 (emphasis added).

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[1] Sections of the Charter and Bylaws of the Boy Scouts, as well as its Rules and Regulations, are part of the record below. *See* Appendix to Respondent's Brief in the Court of Appeal. The Court of Appeal recognized that it could take judicial notice of this material and did so. App. 7a.

The Boy Scouts makes continued affiliation of a local council contingent on the council's fulfillment and enforcement of the purposes and aims of the Boy Scouts. Art. VI, §§ 1, 5. The appellant Mount Diablo Council is a California charitable corporation organized as a membership organization and chartered by the Boy Scouts to serve as one of its local affiliates.

2. The Rules and Regulations of the Boy Scouts provide that "[a] Boy Scout is a boy who . . . is not yet 18 . . . ." Art. VII, § 3, cl.1. On October 28, 1979, Timothy Curran, who for several years had been a Boy Scout in the Mount Diablo Council, turned eighteen. He later applied to become a "Scouter," an adult voluntary leader of the Boy Scouts, in the Council.

In October 1980, a Council representative informed Curran that the Council had learned that he is a homosexual and, for that reason, would not accept him as a Scouter. On November 28, 1980, Curran met with that representative, who reiterated that, as a homosexual, Curran would not provide "a good moral example for younger scouts" (App. 2a), and, therefore, would not be allowed to become a Scouter. It is not disputed that Curran had publicly declared that he is a homosexual.

Curran then asked that the Council's decision be reviewed at the Boy Scouts' headquarters. Counsel for the Boy Scouts, in responding to that request, stated that the Boy Scouts would provide Curran with a review, but advised him that a review would be productive only if he were prepared to show that the information he had previously provided was not true. Otherwise, based on that information, the Boy Scouts had decided that it did not wish to have him as a member. Curran did not pursue the internal review any further.

3. On April 29, 1981, Curran, along with the National Gay Task Force, filed this action in the California Superior Court, seeking a writ of mandate and damages. The trial court sustained the Council's demurrer, holding that

> "a private, voluntary, charitable membership organization with particular religious, political and cultural purposes and membership policies may not be required by the state to open its membership to all persons, irrespective of religious beliefs and practices, irrespective of sexual preference, and irrespective of any other 'non-functional' criterion." (App. 5c)

The court also ruled that membership in the Boy Scouts was not covered by the Unruh Act. (App. 8c) Accordingly, the court dismissed the complaint, but with leave to amend in part.

On August 5, 1981, Curran, as the sole plaintiff, filed an amended complaint, charging that the Council's actions had violated his rights under the Unruh Act and his California common law right to "fair procedure." He again sought a writ of mandate and damages.

The Council again demurred. It argued that (1) neither the Unruh Act nor common law doctrine applied to the Boy Scouts, and (2) if they were found to apply, they would violate the constitutional guarantees of privacy and freedom of association of the United States and California Constitutions, and would violate the Supremacy Clause of the United States Constitution by interfering with membership policies authorized by the federal statute chartering the Boy Scouts. The Superior Court sustained

the demurrer and dismissed the amended complaint. The court recognized that "we are dealing with a private association," and applied the "general rule" that "courts do not involve themselves in the membership activities of private organizations." (App. 2b)

4. On Curran's appeal, the Court of Appeal reversed. The court concluded that, simply because of its large membership, the Boy Scouts is "open to and serving the general public" and is, therefore, a "business establishment" within the meaning of the Unruh Act. (App. 19a) It also ruled that the Unruh Act prohibits *any* nonprofit membership association from barring *any* "class of persons" from membership in the exercise of the judgment that their admission would be inconsistent with the nature or purposes of the organization. (App. 20a) The court opined, therefore, that the Unruh Act prohibits the Boy Scouts (and other membership associations) from excluding homosexuals from membership. (App. 21a)

The court also held that under the state common law requirement of "fair procedure," *any* membership society, no matter how private, is precluded from dissociating itself from any member if its decision "rests upon a rule which is substantively capricious or contrary to public policy." (App. 5a) The court concluded that a homosexual's decision to "come out of the closet"—as the court put it—is "political activity" that the State should encourage. (App. 10a) The Boy Scouts' action, therefore, was termed "distinctly contrary to public policy." *Id.* According to the court, even homosexual conduct would not provide a permissible basis for the Boy Scouts' action unless the Boy Scouts shouldered the burden of proving that the homosexual's conduct creates a "significant dan-

ger of harm . . . to the association resulting from his continued membership." (App. 11a)[2]

The court rejected the Council's position that the recognition of these claims trenched upon the constitutional rights of privacy and freedom of association and, in violation of the Supremacy Clause, interfered with the Boy Scouts' federal charter. (App. 16a-19a, 21a-22a) The California Supreme Court declined to grant discretionary review. (App. 1e)

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[2] The Court of Appeal characterized the actions taken by the Council as an "expulsion." Membership in the Boy Scouts in any position, however, is sought and obtained on a year-by-year basis. In this instance the Council had simply denied Curran's application to acquire a volunteer adult leadership position, that of "Scouter." *See* p.9, *supra*. The decision below that the Unruh Act applies to the Boy Scouts did not turn on any distinction between an initial exclusion from prospective membership and an expulsion from present membership. (App. 11a-22a) The application of the California common law right, by contrast, apparently was affected in some manner by the distinction between exclusion and expulsion (App. 4a-11a), but it is the Boy Scouts' position that the intrusion into its autonomy and its members' constitutional rights is no more justified in determining continued eligibility for membership than in passing on an application for membership.

The court held that Curran's procedural rights would also have been violated by an "expulsion" without a formal hearing. (App. 8a) This procedural objection, however, is of little practical significance. Curran has acknowledged his homosexuality. If homosexuality is a permissible basis for expulsion from the Boy Scouts, he suffered no injury from the lack of any formal hearing on his ineligibility for membership because of his acknowledged sexual preference. *See Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (*per curiam*) (hearing of minimal value if the person does not dispute the substance of the allegations and if the actions taken are not otherwise improper).

THE QUESTIONS ARE SUBSTANTIAL

The constitutional issues presented by this appeal concerning state regulation of the membership policies of private associations are similar to the issues raised in *Gomez-Bethke v. United States Jaycees,* No. 83-724, in which this Court noted probable jurisdiction on January 9, 1984.[3]

The issues here, however, arise in a setting even more inimical to fundamental constitutional principles than in the *Jaycees* case. The issue there is whether a State may require the admission of women members by a large civic organization whose aims include development of adults' business skills. The decision below, by comparison, holds that a State may override the internal membership policies of a private charitable membership organization dedicated to educating young boys and instilling in them certain morals and other values, and compel it to admit persons—avowed homosexuals—who the organization has determined are unsuited for adult leadership positions in the organization.

This extension of the power of the State directly threatens the fundamental associational and privacy rights of millions of American citizens who belong to private membership organizations of every imaginable purpose and character. The Boy Scouts itself presently has over 3.3 million young people as members, and they are aided and guided by over 1 million volunteer adult leaders. The State's intrusion here is particularly grave, because it undermines the right of parents to direct their children's upbringing and education. Where, as here, the organiza-

[3] The Boy Scouts intends to file shortly a brief as *amicus curiae* in support of affirmance in the *Jaycees* case. In its brief, the Boy Scouts will discuss the nature of the freedom of association and the constitutional limitations upon governmental interference with that freedom.

tion's functions involve sponsorship of regular meetings of children and adult leaders under conditions of social intimacy—such as in private homes, in churches, and on camping trips—and where the organization's purpose is to nurture particular personal qualities and values, the constitutional entitlement to freedom from governmental intrusion should be at its zenith. Moreover, the State's interference with the Boy Scouts' membership policies contravenes the Supremacy Clause by threatening the Boy Scouts' ability to function as a nationwide organization, as it was chartered by Congress, and by impeding the organization's exercise of its congressionally authorized autonomy to decide how best to accomplish its central purposes.

I. THE DECISION BELOW INTRUDES UPON FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FREEDOM OF ASSOCIATION AND PRIVACY.

A. Freedom of Association

As this Court recognized over twenty-five years ago, it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause." *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958). Since then, the Court has consistently ruled that the "right of association" is also protected by the First Amendment. *See, e.g., Healy v. James,* 408 U.S. 169, 181 (1972). It is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960).[4]

[4] An organization may assert its members' rights to freedom of association and privacy whenever state action directed at the organization interferes with those rights. *Bates v. City of Little Rock,* 361 U.S. 516, 524 n.9 (1960); *NAACP v. Alabama ex rel. Patterson, supra,* 357 U.S. at 459-60; *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

It is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . ." *NAACP v. Alabama ex rel. Patterson, supra,* 357 U.S. at 460; *accord Griswold v. Connecticut,* 381 U.S. 479, 484 (1965). "The choice of one's associates for social, political, race, or religious purposes is basic in our constitutional scheme." *United States Dep't of Agriculture v. Moreno,* 413 U.S. 528, 541 (1973) (Douglas, J., concurring). This is the essential meaning of "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." *Evans v. Newton,* 382 U.S. 296, 298 (1966).

The freedom to associate includes, by its very nature, the freedom to exclude persons who do not appear to the group to share its members' qualities, ideals or values, and who in the group's judgment would undermine its members' common goals. The constitutional right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122 (1981). As the Court stated in *Gilmore v. City of Montgomery,* 417 U.S. 556, 575 (1974), quoting Justice Douglas' opinion in *Moose Lodge No. 102 v. Irvis,* 407 U.S. 163, 179-80 (1972), "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

As its congressional charter shows, the Boy Scouts serves objectives that are explicitly cultural, educational, religious and social. Its criteria for membership and leadership reflect those values and objectives. Yet, in a frontal assault on the principles established by this Court,

the California court has held that the Unruh Act controls the Boy Scouts' membership policies and that the organization cannot exclude anyone "on the ground that the presence of a class of persons does not accord with the nature of the organization. . . ." (App. 20a)

Similarly, the California common law rule applied below prevents the Boy Scouts and other private membership organizations from excluding a person from membership unless the organization can first prove that particular *conduct* of that person actually would "harm" the group. (App. 10a-11a) This test would, for example, prohibit a Jewish synagogue from excluding Christians from membership unless, because of some conduct, their presence would demonstrably "harm" the congregation. The local Democratic Party could not exclude Republicans without shouldering a similar burden. *But see Democratic Party v. Wisconsin, supra.*

Most offensively, this test would set up the State as the arbiter of the "correctness" of the opinion of members of the Boy Scouts and their parents that avowed homosexuals should not serve as role models for young scouts by occupying adult leadership positions in the organization and should not be brought into intimate social settings with young scouts. If the freedom of association is to have any meaning, it cannot turn on a group's ability to satisfy the State that the values and concerns of its members are "right." *Healy v. James, supra,* 408 U.S. at 187-88.

B. Right To Privacy

The Unruh Act and California common law, as interpreted by the court below, also intrude on the Council members' right of privacy and on the right of their parents to direct their children's upbringing and education. As this Court has explained:

> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' " *Stanley v. Georgia,* 394 U.S. 557, 564 (1969), *quoting Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

This right to be free of government intrusion in certain spheres of personal activity is especially cherished when the education of a minor is at stake. Parents' autonomy "to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York,* 390 U.S. 629, 639 (1968); *see Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Those rights include the freedom to choose the moral and religious education of one's children, as well as the manner in which those values will be inculcated in the child. This Court has long recognized that attempts by the State to force parents to adhere to different values in these areas of fundamental concern

> "unreasonably interfere[ ] with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925).

See also Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (the right "of parental direction of . . . education of their children in their early and formative years [has] a high place in our society"); *Parham v. J.R.,* 442 U.S. 584, 602 (1979); *Meyer v. Nebraska,* 262 U.S. 390, 399-403 (1923).

The Boy Scouts' program operates within this sphere of formative training protected by the right of privacy. As reflected by the Scout Oath and Scout Law, which all scouts are required to follow, the Boy Scouts' purpose is to build qualities of character in young boys, and to inculcate in them specific cultural and religious values and "virtues" (36 U.S.C. § 23) to which the scouts and their parents have chosen to subscribe. The program demands a deeply personal commitment by a scout and his parents in the most intimate surroundings. Many meetings are held in the homes of youth or adult members or in churches, and the group activities include overnight or extended field trips.

The young scout's commitment is, most importantly, a psychological and emotional one: to sharing in the development of beliefs and values, sharing fears and dreams, and building bonds of friendship and comradeship at a time when, as Judge Higginbotham found in a similar case, minors are particularly "vulnerable and malleable." *Boy Scouts of America v. Teal,* 374 F. Supp. 1276, 1281 (E.D. Pa. 1974) (enjoining former Scoutmaster, terminated for homosexuality, from continuing to hold himself out as a Boy Scouts leader).

The decision below nevertheless dictates that these young boys and their parents must admit into their ranks, and thus into their homes, a class of persons, avowed homosexuals, who plainly do not share the same

characteristic—heterosexuality and its attendant beliefs and values—that the members and their parents wish to foster and preserve. The Boy Scouts does not deny homosexual men the right to choose to manifest their "sexual preference of homosexuality." (App. 4a, 10a) The issue in this case, however, is whether the Constitution permits a State to deny the members of the Boy Scouts and their parents the right to decide that homosexual men should not hold positions of adult leadership and guidance in a charitable membership organization with the purposes and activities of the Boy Scouts.

C. Absence of Compelling Interest

The State's interference with the fundamental constitutional rights of the members of the Mt. Diablo Council cannot pass muster in the absence of proof of a compelling State interest that cannot be achieved in any less drastic way. *NAACP v. Button,* 371 U.S. 415, 438 (1963); *Griswold v. Connecticut, supra,* 381 U.S. at 485; *Shelton v. Tucker, supra,* 364 U.S. at 488. California cannot meet that burden of proof here.

The assertion of a generalized governmental interest in ending "discrimination" against homosexuals is not sufficient. If it were, it would enable the States to require individual citizens to refrain from "discrimination" even in inviting persons into their homes, since the very essence of freedom to choose one's associates entails some freedom to be "discriminating." *NAACP v. Button, supra,* 371 U.S. at 429 ("a state cannot foreclose the exercise of constitutional rights by mere labels"); *cf. Stanley v. Georgia, supra,* 394 U.S. at 563.

The State's interest in prohibiting "discrimination" diminishes steadily as the personal decisions being regulated approach the core of what the freedom of association and the right of privacy protect. The State's interest in preventing "discrimination" in the membership policies of charitable associations like the Boy Scouts is, therefore, weak indeed. The Boy Scouts is not a commercial enterprise; nor is it engaged in essentially commercial activity. It is a *bona fide* membership organization with a particular set of values and a specific educational purpose. Its membership is and has been limited to persons willing and able to undertake a commitment to the organization's values through their participation in meetings of members, the mutual support and encouragement of members, and the building of personal relationships among members. *See Bell v. Maryland,* 378 U.S. 226, 313-14 (1964); *compare Daniel v. Paul,* 395 U.S. 298 (1969). Although many youngsters, parents, and volunteers have been willing and able to make this commitment, neither the Council nor the Boy Scouts offers traditionally public facilities available to the community at large without regard to a set of shared values. *Compare Tillman v. Wheaton-Haven Recreation Association, Inc.,* 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Evans v. Newton, supra.* [5]

[5] To the extent that private membership groups engage in commercial or public activities, *those* activities may well be subject to a different degree of state control. But an organization's participation in some ancillary activities having a commercial or public nature cannot abrogate the rights of its members to conduct their principal *internal* activities only with associates of their own choosing.

The State, according to the court below, may prohibit all membership criteria based on any "classifications" of people. That standard presumptively outlaws all ethnic, religious, hereditary or professional associations and societies, unless they prove that the "conduct" of "outsiders" would demonstrably "harm" their organizations. (App. 10a-11a, 18a, 20a-21a) This sweeping repudiation of the historic right to form exclusive associations goes much further than other state actions already found intolerable by this Court. *See, e.g., NAACP v. Alabama ex rel. Patterson, supra.*

II. THE STATUTE AND THE COMMON LAW RULE VIOLATE THE SUPREMACY CLAUSE.

The Supremacy Clause prohibits the application of state laws in a manner that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, ___, 52 U.S.L.W. 4043, 4046 (January 11, 1984); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This doctrine has special force when state law would unduly restrict the activities of a federally chartered entity. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

Congress chartered the Boy Scouts as a national organization with the authority to instill certain virtues and qualities in young boys. 36 U.S.C. § 23. The Boy Scouts is to promote these virtues "through organization." *Id.* The ability of an organization to fulfill its objectives turns on its selection of members and, particularly, on the careful selection of the leaders who play a crucial and intimate role in the educational process. Congress recognized the importance of this function by explicitly

enumerating the Boy Scouts' power to establish criteria for the "election of associates . . . as may be necessary to . . . promote the purposes of the organization." 36 U.S.C. § 22.

The ruling of the court below, however, directly confounds the Boy Scouts' ability to carry out its congressional mandate by overriding the organization's own uniform membership policies and leadership criteria and by declaring the Boy Scouts open to all applicants, at least in California. According to the Court of Appeal, the Boy Scouts may not exclude members based on any "classifications"—sex, age, denial of the existence of God, or sexual orientation—and may not even use "conduct" as a basis for exclusion unless the Boy Scouts proves that the conduct would "harm" the organization. (App. 10a-11a, 18a, 20a-21a) Application of these restrictions would drastically alter the character and autonomy of the organization that Congress chartered by subjecting it to varying membership standards throughout the country. Thus, the judgment below runs afoul of the ancient principle that a State may not "retard, impede, burden, or in any manner control" the operations of federally chartered entities. *M'Culloch v. Maryland, supra,* 17 U.S. at 436.

The court below asserted that there is no Supremacy Clause problem because Congress only empowered the Boy Scouts to make rules and regulations that are "not inconsistent with the laws of the United States, or any State thereof. . . ." 36 U.S.C. § 22. (App. 21a) If this clause meant that the Boy Scouts is subject to *every* restriction a State might decide to impose, any State would be free to bar Boy Scout programs, or to direct the Boy Scouts to abandon support for some "virtues" and to substitute others preferred by the State. The far more plausible interpretation of the congressional language is

that the Boy Scouts cannot claim immunity from state laws (such as fire, safety, health and reporting statutes and regulations) that are incidental to the operation of any organization in the State but do not materially distort the essential character of the organization or obstruct its autonomy.[6]

III. THE ISSUES ARE IMPORTANT.

One hundred fifty years ago, it already had become true that "Americans of all ages, all conditions, and all dispositions constantly form associations." 2 A. DeTocqueville, *Democracy In America* 114 (P. Bradley, ed. 1945). Today, literally thousands of organizations throughout the United States have selective membership requirements that motivate the decision to associate and that act as the unifying principle for affiliation —such as limitations by sex, religious denomination, or ethnic origin. *See* 1 *Encyclopedia of Associations* (D. Akey, ed., 18th ed. 1983). The decision below endangers the historic, fundamental, and widely exercised right of Americans to join together to preserve and promote their shared moral, cultural, religious and social values.

In addition, uncertainty about the applicable constitutional standards jeopardizes the vitality of national

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[6] Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, provides another basis for preemption here. Title II prohibits discrimination in public accommodations, but also provides that the admission policies of "a private club or other establishment not in fact open to the public" are protected from this governmental regulation. 42 U.S.C. § 2000a(e). The author of a related statutory protection for the membership policies of "private clubs" expressly listed the Boy Scouts as one of the organizations to be protected. *See* 110 Cong. Rec. 2296 (Feb. 6, 1964) (colloquy between Rep. Williams and Rep. Meader). The Act allows States to enact similar "public accommodations" statutes, but *only* to the extent that they are "not inconsistent with" Title II. 42 U.S.C. § 2000a-6(b); *see also* 42 U.S.C. § 2000h-4.

membership organizations because they are being subjected to *varying* membership constraints imposed by state governments. The Boy Scouts has already been subjected to conflicting standards under various public accommodations statutes. In Oregon, for example, faced with the same federal constitutional concerns brushed aside by the California court, the Supreme Court of Oregon interpreted its public accommodations statute as inapplicable to the Boy Scouts' membership policies. *Schwenk v. Boy Scouts of America,* 551 P.2d 465 (Or. 1976). In California and Connecticut, however, similar statutes have been held to cover those membership policies, despite federal constitutional objections. *See Pollard v. Quinnipiac Council, Boy Scouts of America,* PA-SEX-37-3 (Conn. Comm. on Human Rights and Opportunities) (decision of the hearing examiner, January 4, 1984, relying on California decision below). As this Court was advised recently, many other national organizations have had their membership policies challenged under similar statutes, with conflicting results. *See* Motion to Affirm, filed in *Gomez-Bethke v. United States Jaycees, supra.*

The Court has recognized the importance of the constitutional issues at stake here by noting probable jurisdiction in the *Jaycees* case. This case, too, merits plenary consideration. The distinctions in the nature, purposes, and functions of the Jaycees and the Boy Scouts, and the different membership criteria at issue in the two cases, may affect the application of the relevant constitutional principles. In addition, California's application of its common law rule to *any* private membership group sweeps more broadly than does the typical public accommodations statute, such as the Minnesota statute involved in the *Jaycees* case.

Finally, this case presents an important Supremacy Clause issue not involved in *Jaycees*. In addition to the Boy Scouts, there are many other federally chartered organizations that have restrictive membership policies that are based on sex, lineage, or other characteristics, *e.g.*, the Girl Scouts of America; Daughters of the American Revolution; Sons of the American Revolution; American War Mothers; Sons of Union Veterans of the Civil War; Blue Star Mothers of America; Gold Star Wives of America; National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic; Ladies of the Grand Army of the Republic. *See generally*, Title 36, United States Code. If the decision below is allowed to stand, it would allow the States to force the restructuring of those congressionally chartered associations as well.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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March 1984

APPENDIX A

[Filed October 3, 1983]
Certified For Publication

IN THE

Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION SEVEN

2d Civ. No. 66755

Super. Ct. No. C365529

TIMOTHY CURRAN,
Plaintiff and Appellant,

vs.

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Defendant and Respondent.

APPEAL from judgment of the Superior Court of Los Angeles County. Robert Weil, Judge. Reversed.

* * *

In this case we are called upon to determine whether the expulsion of a person from membership in the Boy Scouts on the basis of his homosexuality constitutes a violation of both the common law right of fair procedure and the Unruh Civil Rights Act (Civ. Code, § 51). We have determined that using the status of homosexuality as a basis of expulsion is substantively arbitrary and therefore violative of the common law right of fair procedure. Moreover, before homosexuality may lawfully be used as a basis to expel, a rational connection must be

demonstrated between homosexual conduct and any significant danger of harm to the association resulting from the continued membership of the homosexual person. We have further determined that the Boy Scouts is a business establishment within the meaning of the Unruh Act and is therefore prohibited from all discrimination in the provision of its services. Accordingly, we have concluded the trial court improperly sustained the general demurrer without leave to amend and the judgment of dismissal in favor of defendant should be reversed.

FACTS AND PROCEEDINGS BELOW

Plaintiff Timothy Curran filed an amended complaint and petition for writ of mandate (complaint), containing two causes of action against defendant Mount Diablo Council of The Boy Scouts of America. The gist of the first cause of action is that plaintiff's expulsion from, and rejection as "Scouter" by, The Boy Scouts of America, were based not only on an unfair procedure but also on an improper reason, plaintiff's sexual preference of homosexuality. The second cause of action is for violation of plaintiff's rights under the Unruh Civil Rights Act.

From the allegations of the first cause of action of the complaint the following facts emerge. Defendant is part of the Boy Scouts of America, a congressionally-chartered corporation (36 U.S.C.A. §§ 21-29). Plaintiff was a member of defendant in good standing for over five years immediately prior to November 28, 1980, and had attained the rank of Eagle Scout. Prior to November 28, 1980, plaintiff had submitted his application to defendant to become a "Scouter" of the Boy Scouts of America. Such an application by an Eagle Scout is routinely and uniformly approved by defendant. On November 28, 1980, Quentin Alexander, Scout Executive of defendant and acting on its behalf, informed plaintiff that plaintiff was no longer a member of the Boy Scouts of America and could not have "Scouter" status because plaintiff was a homosexual and hence not a good moral example for younger scouts.

Prior to his expulsion and rejection plaintiff was not given notice or a fair opportunity to be heard. After his expulsion and

rejection, plaintiff made written request to the Western Region of the Boy Scouts of America, of which defendant is a subordinate body, for an administrative review of defendant's decision. Defendant advised plaintiff that such a review would not be productive unless in fact plaintiff was not a homosexual. No other administrative remedy is available and, as a consequence thereof, all administrative remedies were exhausted.

Plaintiff further alleges in the first cause of action that membership in the Boy Scouts of America is of considerable financial value to its members in admission to institutions of higher learning, in employment, and in advancement in the business world.

In the second cause of action of his complaint, plaintiff incorporates all the allegations of the first cause of action. Plaintiff further alleges inter alia that the Boy Scouts of America is the owner of the copyright of the Boy Scouts' emblem and uniform, which are franchised to retail outlets throughout the United States. It derives great financial revenues from such franchising. In addition, the Boy Scouts of America is engaged in the book publishing business and publishes and sells a variety of books throughout the United States. Furthermore, defendant maintains a retail shop in Walnut Creek, California, where it engages in extensive commercial activities.

In addition to mandamus seeking plaintiff's reinstatement in defendant and attainment of "Scouter" status, the complaint seeks a permanent injunction barring defendant from interfering with plaintiff's rights under the Unruh Civil Rights Act and for damages.

This appeal raises the following issues:

(1) Does the first cause of action state a valid claim for wrongful denial of the common law right of "fair procedure"?

(2) Does the second cause of action state facts showing a violation of the Unruh Civil Rights Act (Civ. Code, § 51) in that (a) the Boy Scouts is a "business establishment" within the meaning of the Unruh Act and (b) plaintiff's expulsion or exclusion from defendant on

the basis of his sexual preference of homosexuality, which deprives him of defendant's services, constitute a violation of the Unruh Act?

Our task on this appeal was stated by our Supreme Court in *Glaire* v. *La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 918: "Our only concern in this case is whether plaintiff has succeeded in stating a cause of action. In assessing the sufficiency of a complaint against a general demurrer, we must treat the demurrer as admitting all material facts properly pleaded. [Citations omitted.] Furthermore, we bear in mind our well established policy of liberality in reviewing a demurrer sustained without leave to amend: 'the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties.' "

I

THE FIRST CAUSE OF ACTION STATES A VALID CLAIM FOR WRONGFUL DENIAL OF THE COMMON LAW RIGHT OF FAIR PROCEDURE

Plaintiff argues that defendant's action in expelling him from membership in the Boy Scouts of America and in denying him "Scouter" status on the basis of his sexual preference of homosexuality was both substantively irrational and procedurally unfair.

Under common law, relief was afforded to any individual expelled from a private association who could demonstrate (1) that the society's rules or proceedings were contrary to "natural justice," (2) that the society had not followed its own procedures, or (3) that the expulsion was maliciously motivated. (*Dawkins* v. *Antrobus* (1881) 17 Ch.D. 615; see Chafee, *The Internal Affairs of Associations Not For Profit* (1930) 43 Harv. L.Rev. 993, 1014-1020.)

This common law principle authorizing judicial review of expulsions from associations became part of California law before the turn of the century. (See *Otto* v. *Tailors' P. & B. Union* (1888) 75 Cal. 308.) Since then, this common law

principle has been reiterated in an unbroken line of California decisions. (See, e.g., *Von Arx* v. *San Francisco G. Verein* (1896) 113 Cal.377; *Taboada* v. *Sociedad Espanola etc.* (1923) 191 Cal. 187, 191-192; *Ellis* v. *American Federation of Labor* (1941) 48 Cal.App.2d 440, 443-444; *Cason* v. *Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134, 143-144; *Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550-553.; *Ezekial* v. *Winkley* (1977) 20 Cal.3d 267; *Hackethal* v. *California Medical Assn.* (1982) 138 Cal.App.3d 435.)

Taken together, these decisions establish that the expulsion of a person from membership in a private unincorporated association is deemed "arbitrary" and in violation of the common law right of fair procedure when the expulsion is substantively unreasonable, internally irregular, or procedurally unfair. (*Ezekial* v. *Winkley, supra,* 20 Cal.3d at p. 272.) Procedural fairness requires "adequate notice of the 'charges' . . . [and] a reasonable opportunity to respond." (*Pinsker* v. *Pacific Coast Society of Orthodonists, supra,* 12 Cal.3d at p. 555.) Furthermore, an expulsion cannot properly rest on a rule which is substantively capricious or contrary to public policy. (*Id.,* at p. 553).

In applying this common law protection against arbitrary expulsion, the courts use a two-step analysis. First, a judicial evaluation of the procedure followed by the association is made to determine if the procedure is fair. For example, in *Hackethal* v. *California Medical Assn., supra,* 138 Cal.App. 3d 435, which involved an action by an expelled member of a county medical society seeking reinstatement, the court held the society's proceedings did not meet common law standards of fair procedure. The court found that the society held hearings outside the presence of the expelled member and his counsel, denied the expelled member access to documentary evidence forming the basis of the charges, and used a standard of proof contrary to its bylaws.

Secondly, judicial inquiry is made to determine whether the expulsion rests upon a rule which is substantively capricious or contrary to public policy. For example, in *Bernstein* v. *Alameda etc. Medical Assn.* (1956) 139 Cal.App.2d 241, the

court held that a medical society could not lawfully expel a doctor for making disparaging statements about another doctor's professional work in the course of legal proceedings.

Defendant contends that plaintiff does not come within the ambit of this common law principle because there are no allegations showing plaintiff was divested of any vested right in specific property, which this principle requires for its application. Defendant cites *Otto* v. *Tailors' P. & B. Union, supra,* 75 Cal. 308, *Von Arx* v. *San Francisco G. Verein, supra,* 113 Cal. 377, *Taboada* v. *Sociedad Espanola, supra,* 191 Cal. 187, and *Grand Grove A. O. of D.* v. *Duchein* (1894) 105 Cal. 219, in support of its argument. Defendant argues that in each of these cases the court intervened to prevent a private association from unjustly enriching itself by depriving a member of his share of the property of an association through an unfair expulsion.

While a superficial reading of these cases might suggest that defendant's restrictive interpretation has some support, this attempt to confine these cases to such a narrow base ignores recent development in this area of the law. In *Ezekial* v. *Winkley, supra,* 20 Cal.3d 267, our Supreme Court gave these cases a broader construction. The court stated: "The underlying theme of these decisions, variously stated, is that *membership in an association, with its associated privileges, once attained, is a valuable interest which cannot be arbitrarily withdrawn.* Thus, they comport with the broader principle that one on whom an important benefit or privilege has already been conferred may enjoy legal protection not available to an initial applicant for the same benefit." (*Id.,* at p. 273; emphasis added.)

In this case, plaintiff alleges two important benefits which are entitled to legal protection. First, he was a member in good standing of the Boy Scouts at the time of his expulsion. Secondly, he had attained the rank of Eagle Scout, which ensures routine promotion to the status of "Scouter."

Defendant, however, contends that this is not an expulsion case, but rather a case involving an exclusion from membership in a private association. Defendant argues that plaintiff was a Boy Scout until October 28, 1979, when he became eighteen

years of age. Defendant urges this court to take judicial notice of Article VII, Section 3 of the Rules and Regulations of The Boy Scouts of America. (See *Young* v. *Boy Scouts of America* (1935) 9 Cal.App.2d 760, 764.) Defendant argues that this section provides that a boy may be a Boy Scout until he is eighteen years old. Thus, plaintiff was not a member on November 28, 1980, the date of his alleged expulsion from the Boy Scouts. Defendant argues that this case therefore turns on the applicability of the narrower principles in the *Marinship-Pinsker*[1] cases, prohibiting arbitrary exclusions from membership in private associations which "possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced." (*Ezekial* v. *Winkley, supra,* 20 Cal.3d 267, 272.)

"On demurrer, it is not the function of a trial court, or of this court, to speculate on the ability of a plaintiff to support, at trial, allegations well pleaded." (*Meyer* v. *Graphic Arts International Union* (1979) 88 Cal.App.3d 176, 179.) Plaintiff's allegations must be accepted as true for the purpose of ruling on a demurrer, unless they contradict or are inconsistent with facts judicially noticed by the court. (*Saltares* v. *Kristovich* (1970) 6 Cal.App.3d 504, 510.)

We have taken judicial notice of this section, which provides: "A Boy Scout is a boy who has completed the fifth grade and is at least 10½ years of age or older and in either case is not yet 18 who . . . becomes a registered member of a Boy Scout troop. . . ." A reasonable construction of this section is that a boy must join the Boy Scouts before reaching the age of 18.[2] Thus, there would be neither a contradiction nor inconsistency between the allegation that plaintiff was a member in good standing of the Boy Scouts, and the facts judicially noticed. We conclude, therefore, that this is an expulsion, rather than an exclusion, case under the allegations of the first

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[1] *James* v. *Marinship Corp.* (1944) 25 Cal.2d 721, 731; *Pinsker* v. *Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160 (Pinsker I); and *Pinsker* v. *Pacific Coast Society of Orthodontists, supra,* 12 Cal.3d 541 (Pinsker II).)

[2] This section has a patent ambiguity and thus, within the policy of liberality governing our review, we give this section a broad construction. At trial, extraneous evidence may be necessary.

cause of action. Hence, the determination of whether a cause of action is stated turns on the application of the *"broader principle"* applicable to "an important benefit or privilege [that] has already been conferred." (*Ezekial* v. *Winkley, supra,* 20 Cal.3d 267, 273, emphasis added.)

We now turn to whether the first cause of action states a valid claim for wrongful denial of the common law right of fair procedure. Here, the complaint alleges that, without notice or an opportunity to respond, plaintiff was expelled from the Boy Scouts on the ground he was a homosexual and hence not a good moral example for younger scouts.

Based on a reasonable construction of these allegations, we find that an expulsion from a private association under such circumstances is both procedurally unfair and substantively unreasonable.

First, the elements of adequate notice of charge and reasonable opportunity to respond are basic to common-law fair procedure. (*Hackethal* v. *California Medical Assn., supra,* 138 Cal.App.3d at p. 442.)

Secondly, an expulsion from an association on the basis of a person's status of homosexuality is both capricious and offensive to public policy. The mere status of homosexuality without more does not connote immorality. In *Stoumen* v. *Reilly* (1951) 37 Cal.2d 713, the liquor license of the plaintiff had been revoked because he was found to have conducted a disorderly house in violation of section 58 of the Alcoholic Beverage Contract Act.[3] The violation was based on the licensing board's finding that " 'persons of known homosexual tendencies patronized said premises and used said premises as a meeting place.' " (*Id.*, at p. 715.) Our Supreme Court reversed, saying that no evidence of any illegal or immoral

[3] Section 58 provided: "Every licensee or agent or employee of any licensee who keeps or permits to be used or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety shall be guilty of a misdemeanor."

conduct on the premises had been shown: "[S]omething more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place." (*Id.*, at p. 717.)

In addition, inhibiting association members' public and civic rights is contrary to public policy. (See *Mitchell* v. *International Assn. of Machinists* (1961) 196 Cal.App.2d 796, 804; *Zelewka* v. *Benevolent & Protective Order of Elks* (1974) 129 N.J. Super. 379 [324 A.2d 35, 37-38]; Note, *Developments in the Law-Judicial Control of Actions of Private Associations* (1963) 76 Harv. L. Rev. 983, 1006.) Although some people's ideal of human adjustment is unconditional conformity, the genius of American pluralistic society has been its ability to accept diversity and differences. An appeal to this genius in the espousal of a cause and some degree of action to promote the acceptance thereof by other persons is "political activity." (*Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 487.) Thus, the struggle of the homosexual community for equal rights is recognized as political activity. (*Id.*, at 488.) "[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' and acknowledge their sexual preferences, and to associate with others in working for equal rights." (*Ibid.*)[4]

The essence of this right was expressed in *Sweezy* v. *New Hampshire* (1957) 354 U.S. 234, 250-251: "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . . The absence of such voices would be a symptom of grave illness in our society."

In the instant case the allegations can reasonably be construed as charging that defendant's action to expel rests on

[4] Twenty-one states, including California, have decriminalized private, consensual adult homosexual sexual acts. (See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States* (1979) 30 Hastings L.J., 799, 950-951; Cal. Penal Code, §§ 286, 288a.)

plaintiff's political decision to "come out of the closet" and acknowledge his sexual preference of homosexuality. As so construed, the expulsion would be distinctly contrary to public policy. (Cf. *Bernstein* v. *Alameda, etc. Medical Assn., supra,* 139 Cal.App.2d 241, 246.)

On the other hand, if defendant's action to expel is based on plaintiff's homosexual conduct, then plaintiff's right of freedom of expression is qualified with respect to his participation in the activities of defendant. In this context, the association's natural right of self-preservation comes into play. (See *Davis* v. *Int. Alliance Etc. Employees* (1943) 60 Cal.App.2d 713,715.) However, since plaintiff's role in defendant is analogous to a school teacher's, the standard used in *Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214 (involving private, noncriminal homosexual conduct) and *Board of Education* v. *Jack M.* (1977) 19 Cal.3d 691 (involving public, criminal homosexual conduct) in connection with the revocation of teaching credentials and dismissals can be applied here. Taken together, these cases hold that a teacher should not be dismissed or lose his license, even where the person has engaged in homosexual conduct, unless his unfitness to teach can be demonstrated.

Justice Tobriner, writing for the majority in each case, specified that the factors which may be considered in making such a determination are "the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers." (*Morrison* v. *State Board of Education, supra,* 1 Cal.3d at p. 229.) The applicable factors should be used in the instant case to determine if there is a rational nexus between plaintiff's homosexual conduct, if any,

and harm to the Boy Scouts resulting from his continued membership.

Applying this *Morrison* standard to the instant case, we hold that, before homosexual conduct, whether private or public, criminal or noncriminal, may lawfully be used as a basis to expel plaintiff from membership in defendant, a connection must be demonstrated between his homosexual conduct and any significant danger of harm *(id.,* at p. 235) to the association resulting from his continued membership.

For the foregoing reasons, we hold that plaintiff has stated a valid claim for wrongful denial of the common law right of fair procedure in his first cause of action.

II

VIOLATION OF THE UNRUH CIVIL RIGHTS ACT IS STATED

Plaintiff further contends that either his expulsion or exclusion from defendant on the basis of his sexual preference of homosexuality deprives him of defendant's services and thus violates the Unruh Civil Rights Act (Civ. Code § 51).

The Unruh Act provides in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code § 51.)[5]

A. The Historical Perspective of the Unruh Act

To put the present inquiry into its proper historical perspective, our analysis must begin with an exploration of the development of public accommodation laws in California.

Under California's early common law, enterprises which were affected with a public interest had a duty to provide service to all without discrimination. (*In re Cox* (1970) 3

[5] Section 51 of the Civil Code provides that it shall be known as the "Unruh Civil Rights Act."

Cal.3d 205, 212.) In 1897, statutory recognition was given to this common law doctrine by the enactment of the predecessor of the present Unruh Act. (*Id.*, at p. 213.)[6] This 1897 act was "similar to statutes enacted during the same periods by a number of states. The immediate impetus for enactment of these statutes by the states was the holding of the United States Supreme Court in the Civil Rights Cases [(1883) 109 U.S. 3] that the federal government had no constitutional power to enact such a statute." (See Horowitz, *The 1959 California Equal Rights In "Business Establishments" Statute—A Problem In Statutory Application* (1960) 33 So.Cal.L.Rev. 260, 277.)

From 1897 until 1959, when Unruh was enacted, the language of the public accommodation statute was amended on several occasions, with the Legislature listing additional specific places of public accommodation but always including the general category of "all other places of public accommodation or amusement." (See Stats. 1919, ch. 210, § 1, p. 309, and stats. 1923, ch. 235, § 1, p. 485.) Despite the broad language forbidding discrimination by "all other places of public accommodation," certain decisions of appellate courts made in the late 1950's reveal a judicial effort to "improperly" curtail "the scope of the public accommodation provisions" by narrowly defining the kinds of businesses that afforded public accommodation. (See *In re Cox, supra,* 3 Cal.3d at p. 214.) For example, in *Long* v. *Mountain View Cemetery Assn.* (1955) 130 Cal.App.2d 328, 329, the court held "the expression 'all other places' means all other places of a like nature to those enumerated," and therefore found the association's white-only policy to be lawful. Similarly, in *Coleman* v. *Middlestaff* (1957) 147 Cal.App.2d Supp. 833, 834-835, the court said, "We do not consider that a dentist's office is a place of like nature to those enumerated," and permitted a dentist to refuse service to a black patient. Finally, in *Reed* v. *Hollywood*

[6] The 1897 act provided: "That all citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and *all other places of public accommodation or amusements*, subject only to the conditions and limitations established by law and applicable alike to all citizens." (Stats. 1897, ch. 108, § 1, p. 137; emphasis added.)

Professional School (1959) 169 Cal.App.2d Supp. 887, 890, the court held "a private school is not a place of public accommodation" and could therefore exclude black students.

Out of a concern for, and in response to, these decisions restricting the scope of the public accommodations provisions, the Legislature in 1959 enacted the Unruh Act, which provided in part: " 'All citizens . . . are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.' " [7] (*In re Cox, supra,* 3 Cal.3d at p. 214.)

B. "Business Establishments" Include All Entities, Whether Carried On For Profit Or Not, Which Are Open To And Serving The General Public

With this historical perspective in mind, we are called upon to determine whether the Boy Scouts, of which the defendant is a part, comes within the meaning of the statutory phrase "all business establishments of every kind whatsoever."

As with all statutes the Unruh Act must be construed in the light of its legislative purpose and design. (*People ex rel. Younger* v. *Superior Court* (1976) 16 Cal.3d 30, 40.) Moreover, in enforcing the command of the Unruh Act, both the policy expressed in its terms, and the object implicit in its history and background should be recognized. (*Winchell* v. *English* (1976) 62 Cal.App.3d 125, 128.) Furthermore, since the Unruh Act is remedial in nature, it is to be given a liberal construction "with a view to effect its object and to promote justice." (*Ibid.*)

The first step in our analysis is to determine the intended meaning of the word "business" as used by the Legislature.

Our Supreme Court considered the meaning of the word "business" in *Marin Municipal Water Dist.* v. *Chenu* (1922)

[7] The Legislature in 1961 substituted "all persons" for "all citizens", and in 1974, added "sex." These amendments broaden the applicability of section 51.

188 Cal. 734. There, the Supreme Court stated: "The general definition of the word [business] is 'that which busies, or engages time, attention, or labor, as a principal serious concern or interest,' but the word has a narrower meaning applicable to occupation or employment for livelihood or gain and to merchantile or commercial enterprises or transactions." (*Id.*, at p. 738.) Thus, the word "business" has a broad as well as narrow meaning.

Defendant argues that, by expressly limiting the Unruh Act to "business establishments," the intent of the Legislature was to confine its application to commercial enterprises and activities under the *narrow* meaning of business. Hence, nonprofit and charitable organizations like the Boy Scouts are outside the scope of the statute. Moreover, the defendant argues that the definition of "business" given in *Burks* v. *Poppy Construction Co.* (1962) 57 Cal.2d 463, 468, and repeated with approval in *O'Connor* v. *Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795, supports this position. We disagree.

Our examination of *Burks* reveals that the Supreme Court determined the Legislature intended the word "business" as used in the Unruh Act to reflect both a broad meaning to include noncommercial entitites as well as a narrow meaning to include commercial entities.

First, the Supreme Court determined that the Unruh Act was adopted to *include* the prohibition against discrimination in places of public accommodation or amusement as provided by earlier common law and statutory public accommodations provisions as well as to *extend* the prohibition against discrimination to "all business establishments." (*Id.*, at p. 471.)

Secondly, the Supreme Court implicitly presumed that the Legislature in enacting a statute such as the Unruh Act was familiar with both the relevant rules of statutory construction governing remedial legislation and prior judicial interpretation of particular words. Thus, when it couches its enactment of a remedial statute in such words without exception, the Legislature intends its broadest application. (*Id.*, at p. 468; see, e.g., *Keeler* v. *Superior Court* (1970) 2 Cal.3d 619, 625.)

Thirdly, in determining the meaning of the word "business" as intended by the Legislature, the Supreme Court cited and relied on *Mansfield* v. *Hyde* (1952) 112 Cal.App.2d 133, 137 (57 Cal.2d at p. 468), which in turn cited and relied on *Marin Municipal Water Dist.* v. *Chenu, supra,* 188 Cal. 734, 738. In *Mansfield,* the court stated: " 'Business' in its *broad* sense embraces everything about which one can be employed; the word is often synonymous with a calling, occupation, or trade, engaged in for the purpose of obtaining a livelihood or profit or gain. [Citation.]" (112 Cal.App.2d at pp. 137-138; emphasis added.) That the *Mansfield* court defines business in both its broad as well as narrow meaning cannot be disputed. This is also true in *Burks,* where the Supreme Court stated: "The word 'business' embraces everything about which one can be employed, and it is often synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.' [Citations.]" (57 Cal.2d at p. 468.)

Fourthly, the Supreme Court determined that "[t]he word 'establishment,' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' *or 'a permanent settled position (as in life or business).'* " (*Id.,* at pp. 468-469; emphasis added.) It goes without saying that the latter part refers to a non-commercial organization.

Finally, the Supreme Court determined that the use of the words "all" and "of every kind whatsoever" in referring to business establishments is indicative of an intent by the Legislature "that the term 'business establishments' was used in the broadest sense reasonably possible." (*Id* at p. 468.)

Although in *Burks* the court determined the word "business" included both commercial and noncommercial entities, its application in the broadest sense was unnecessary because the enterprise and activities involved there were both commercial. However, this was not the situation in *O'Connor* v. *Village Green Owners Assn., supra,* 33 Cal.3d 790.

In *O'Connor,* the Supreme Court was confronted with whether a nonprofit owners association, charged with the

responsibility of enforcing an age restriction on residency in a condominium complex, was a business establishment within the meaning of the Unruh Act. After quoting with approval the discussion in *Burks* as to the scope of the phrase "all business establishments of every kind whatsoever" the court compared the original version[8] of the bill presented to the Legislature with the final version enacted as the Unruh Act. The Supreme Court found the broadened scope of "business establishments" in the final version of the bill "indicative of an intent by the Legislature to include therein all formerly specified private and public groups or organizations that may reasonably be found to constitute 'business establishments' of every type whatsoever." (33 Cal.3d at pp. 795-796.)

Moreover, the Supreme Court further concluded that "[n]othing in the language or history of [the] enactment [of the Unruh Act] calls for excluding an organization simply because it is nonprofit." (*Id.*, at p. 796.) Although the Supreme Court found the owners association had "businesslike attributes" to come within the scope of "business establishment," we construe this to mean that the association fits both the commercial and non-commercial aspects of the meaning of "business establishment." Here, the same situation exists. There are allegations showing that defendant has certain "businesslike attributes."

Despite this, defendant argues that any construction of the Unruh Act to bring the Boy Scouts within the meaning of "business establishment" would constitute an infringement of its rights of privacy and free association as a membership organization. The "governing principle," defendant asserts, is found in the following dissenting opinion of Mr. Justice Douglas in *Moose Lodge No. 107* v. *Irvis* (1972) 407 U.S. 163,

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[8] The original version of the bill read in part: "All citizens within the jurisdiction of this State, no matter what their race, color, religion, ancestry, or national origin, are entitled to the full and equal admittance, accommodations, advantages, facilities, membership, and privileges in, or accorded by, all public or private groups, organizations, associations, business establishments, schools, and public facilities; to purchase real property; and to obtain the services of any professional person, group or associations." (*O'Connor* v. *Village Green Owners Association, supra*, 33 Cal.3d 790, 795, fn. 5; *Burks* v. *Poppy Construction Co., supra*, 57 Cal.2d 463 at p. 469, fn. 3.)

179-180: "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or women who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race."

Taking this principle literally as "governing" would afford protection to the most flagrant form of discrimination under the canopy of the right of free association. The answer is, of course, that those with a common interest may associate exclusively with whom they please *only* if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association. (See Note, *Association, Privacy and Private Club: The Constitutional Conflict* (1970) 5 Harv.C.R.—C.L.L.Rev. 460, 466-467.) "The character and extent of any interference with the freedom of association must be weighed against the countervailing interests." (Note, *Sex Discrimination in Private Clubs* (1977) 29 Hastings L.J. 417, 422.)

Accordingly, these constitutional provisions only restrain the Legislature from enacting anti-discrimination laws where *strictly* private clubs or institutions are affected. (See, e.g., *Burks* v. *Poppy Construction Co., supra,* 57 Cal.2d 463, 471; *Stout* v. *Y.M.C.A.* (5th Cir. 1968) 404 F.2d 687; *Nesmith* v. *Y.M.C.A.* (4th Cir. 1968) 397 F.2d 96; *National Organization for Women, Essex Chapter* v. *Little League Baseball, Inc.* (1974) 127 N.J.Super 552 [318 A.2d 33].)

Our function here is succinctly stated in *Kramer* v. *Municipal Court* (1975) 49 Cal.App.3d 418, 424: "Our duty in interpreting the . . . statute is not limited to avoiding a construction which makes it clearly unconstitutional. [Citation.] It goes further: if possible, the statute *must* be construed so that 'constitutional difficulties' will not even arise." (Emphasis added.)

To avoid the constitutional infirmity argued by defendant, criteria have been established to determine, in the context of the Unruh Act and similar statutes, whether a group is private or public. (See *Nesmith* v. *Young Men's Christian Assn., supra,* 397 F.2d 96, 98-102; *Cornelius* v. *Benevolent Protective Order of Elks* (D.Conn. 1974) 382 F.Supp. 1182; *Wright* v. *Cork Club* (S.D.Tex. (1970) 315 F.Supp. 1143.)

In determining whether an establishment is in fact a private club, there is no single test. (*Nesmith* v. *Young Men's Christian Assn., supra,* 397 F.2d at p. 101.) However, "[s]electivity is the essence of a private club." (*Wright* v. *Cork Club, supra,* at p. 1151.) " 'Where there is a large membership or a policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective.' " (*Nesmith* v. *Y.M.C.A., supra,* 397 F.2d at p. 102.) An organization "with no limits on its membership and with no standards for admissibility, is simply too obviously unselective in its membership policies to be adjudicated a private club." (*Ibid.*)

Since the essence of a private club or organization is exclusivity in the choice of one's associates, we find this approach ensures that private organizations remain protected. However, those entities which are not in fact private must comply with the mandate of the Unruh Act.

Moreover, we find that to allow an organization to offer its facilities and membership to the general public, but exclude a class of persons on a basis prohibited by law would be contrary to the public policy expressed in the Unruh Act. Although our research discloses no California cases directly on point, cases decided under the federal and sister states' public accommodations statutes are persuasive here. For example, in *Tillman* v. *Wheaton-Haven Recreation Assn. Inc.* (1973) 410 U.S. 431, 438, a nonprofit recreational association open to all white residents in a certain area was found not to be a private club exempt from the Public Accommodation Law (Title 11 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, et seq.) because it had "no plan or purpose of exclusiveness." Similarly, in *Sullivan* v. *Little Hunting Park, Inc.* (1969) 396

U.S. 229, 236, a community park open to all area residents who were not black was held not be a private club since "[i]t is open to every white person within the geographic area, there being no selective element other than race." In *National Organization for Women* v. *Little League Baseball, Inc., supra,* 127 N.J.Super. 552 [318 A.2d 33], a membership organization for boys was held to be a public accommodation under New Jersey's public accommodation law. There, the court said: "Little League is a *public* accommodation because the invitation is open to children in the community at large, with no restriction (other than sex) whatever." (318 A.2d at pp. 37-38.)

We therefore conclude that the concept of organizational membership per se cannot place an entity outside the scope of the Unruh Act unless it is shown that the organization is truly private.

The Legislature's intent to include organizations such as the Boy Scouts within the scope of the Unruh Act is also found in the enactment of the Fair Employment Practices Act and the Fair Housing Law. Both these civil rights acts were passed in 1959 during the same session as the Unruh Act. Unlike the Unruh Act, however, these two acts specifically excluded nonprofit entities. For example, the Fair Employment Practices Act[9] contained an express exclusion for social clubs, and fraternal, charitable, educational or religious associations or corporations not organized for profit. The Fair Housing Law[10] also specifically excluded housing operated by nonprofit religious, fraternal, or charitable associations or corporations.

We therefore conclude that the term "business establishments," consistent with the Legislature's intent to use the term in the broadest sense reasonably possible, includes all commercial and noncommercial entities open to and serving the general public. Accordingly, we hold the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act.

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[9] Formerly Lab. Code, § 1413, subd. (d), enacted by Stats. 1959, ch. 121, § 1, p. 2000; now Gov. Code, § 12926, subd. (c).

[10] Formerly Health & Saf. Code, § 35710, subd. (f), enacted by Stats. 1959, ch. 1681, § 1, p. 4074; now Gov. Code, § 12927.

C. Exclusion Of Plaintiff On The Basis Of His Sexual Preference Of Homosexuality Is Not Permissable Under The Unruh Act.

The primary purpose of the Unruh Act is to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the Act. (See *Marina Point, Ltd.* v. *Wolfson* (1982) 30 Cal.3d 721, 738, citing *Piluso* v. *Spencer* (1918) 36 Cal.App. 416, 419.)

After reviewing the common law origin, the legislative history and past judicial interpretations of the Act and its statutory predecessors, our Supreme Court in *In re Cox, supra,* 3 Cal.3d 205, 216, held that the Unruh Act bars all types of arbitrary discrimination. The Act's reference to particular bases of discrimination—"sex, color, race, religion, ancestry or national origin"—is illustrative rather than restrictive. (*Ibid;* Accord: *Marina Point, Ltd.* v. *Wolfson, supra,* 30 Cal.3d at p. 732; *O'Connor* v. *Village Green Owners Assn., supra,* 33 Cal.3d at p. 794.)

Moreover, the statute's focus on the individual precludes the exclusion of persons based on a generalization about the class to which they belong. For example, the statutory protections of the Act bar exclusionary policies directed against (1) homosexuals (*Stoumen* v. *Reilly, supra,* 37 Cal.2d 713, 716); (2) reputed immoral persons (*Orloff* v. *Los Angeles Turf Club* (1951) 36 Cal.2d 734); (3) children (*Marina Point, Ltd.* v. *Wolfson, supra,* 30 Cal.3d 721); (4) students (59 Ops.Cal.Atty.Gen. 70 (1976)); and (5) those who associate with blacks (*Winchell* v. *English, supra,* 62 Cal.App.3d 125, 128-130).

Nor can an exclusion be justified only on the ground that the presence of a class of persons does not accord with the nature of the organization or its facilities. (See, e.g., *Marina Point, Ltd.* v. *Wolfson, supra,* 3j0 Cal.3d at p. 741.) However, an organization may "promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided." (*In re Cox, supra,* 3 Cal.3d at p.217.)

Here, plaintiff asserts that he was expelled from membership in the Boy Scouts, and excluded from "Scouter" status therein, on the claim that he is not a good moral example for younger scouts due to his sexual preference of homosexuality.

In *Stoumen* v. *Reilly, supra,* 37 Cal.2d 713, 716, our Supreme Court recognized that the Unruh Act prohibits the exclusion of a person on the basis of homosexual status. Also, in *Gay Law Students Assn.* v. *Pacific Tel. & Tel. Co., supra,* 24 Cal.3d 458, 475, the court held that section 453, subdivision (a) of the Public Utilities Code prohibits arbitrary employment discrimination against homosexuals, although homosexuals are not specified in the statutory language. Thus, we conclude that the Unruh Act prohibits arbitrary discrimination against homosexuals.

Defendant argues, however, that the enforcement of the Unruh Act against it would violate the Supremacy Clause of the United States Constitution, article VI, clause 2.[11] Defendant contends that the Boy Scouts of America is authorized under the charter granted it by Congress in 1916 (see 36 U.S.C.A. §§ 21, et seq.) to employ membership requirements based on sex, religious beliefs, political beliefs and other criteria the organization has historically applied.

This argument rests on the premise that Congress, in granting the federal charter, intended to authorize the Boy Scouts to practice discrimination against homosexuals.

Contrary to the position of defendant, the language of the federal charter demonstrates the opposite intent: "The name of the corporation created by this chapter shall be 'Boy Scouts of America,' and by that name it shall have . . . power . . . to make and adopt by-laws, rules and regulations *not inconsistent with the laws of the United States, or any State thereof* . . ." (36 U.S.C.A. § 22; emphasis added.) Thus, there is no Supremacy Clause problem. Moreover, the Unruh Act is not in conflict with the Boy Scouts' charter. (See, e.g., *Perez* v. *Campbell* (1971) 402 U.S. 637, 644.)

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[11] U.S. Const., art. VI, ¶ 2 provides in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

We therefore hold that the plaintiff has stated a cause of action for violation of the Unruh Act.

Accordingly, the judgment in favor of defendant is reversed and the trial court is directed to overrule the demurrer of defendant.

CERTIFIED FOR PUBLICATION.

THOMPSON, J.

We concur:

SCHAUER, P. J.

JOHNSON, J.

APPENDIX B

Superior Court of the State of California

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 85 HON. ROBERT I. WEIL, JUDGE

No. C 365 529

TIMOTHY CURRAN,
Plaintiff-Petitioner,

vs.

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Defendant-Respondent.

REPORTER'S
PARTIAL TRANSCRIPT OF PROCEEDINGS

Order of the Court
Friday, October 30, 1981

* * *

LOS ANGELES, CALIFORNIA,
FRIDAY, OCTOBER 30, 1981.

* * *

THE COURT: Well, all right. I have heard excellent argument on both sides and I have read all of the briefs and I have read all of the cases.

It is my conclusion that the demurrers for a variety of reasons, including the quick appellate review in the event I am

wrong, which I don't think I am, should be sustained without leave as to both the first and the second causes of action.

I think as to the second cause of action, my contemplation and understanding of "business establishment" is a place, a thing that someone is precluded from going into, from being served at, from buying something at, from getting some service out of. And I don't think, despite its economic activity, which is well pleaded here, that the history of the Unruh Act, as illustrated by the defendants, contemplated within its ken the type of organization that is the Mount Diablo Scouting Council, despite the fact that that Council might operate stores or despite the fact that that Council might be, quote, "a part," whatever that is, close quote, of the national scout movement.

As to the first cause of action, again, I think we must trace back to the fact that where state action is not involved, we are dealing with a private association, though it seems strange to say that when we are dealing with one that is as large in numbers or membership as this one, but be that as may, state action is not here involved, unlike the ruling of the court in the Gay Task Force vs. Pacific Tel and Tel case.

And it is conceded here by the plaintiff that state action is not involved, which then throws us back to the only two possible exceptions to the general rule, which says that courts do not involve themselves in the membership activities of private organizations.

One is the Marinship line of cases. The other is the insurance or the pension fund line of cases. And I do not find, despite the pleading, sufficient analogy to either line of cases that would justify making either exception applicable.

So for those reasons, I would sustain the demurrers without leave under CCP 430.10(e) to both causes of action and instruct the clerk to enter an order of dismissal as to the second cause of action and instruct the respondent to prepare a judgment as to the first cause of action, both of which I think can get much speedier review, if that is the desire of the petitioner here, than were it otherwise, because it is certain to me, and I know this, that whichever way this matter were ever

ruled upon on a trial, assuming there was a trial, I am sure that either side would appeal whatever the result of that trial would be.

And it seems to me that this ruling will also enable both sides here to get to the appellate courts much faster, because this may well be a question that is going to be determined by the appellate court, and I think this puts the matter in the best posture to do so.

I thank both counsel for excellent exposition, for excellent briefing and for excellent argument.

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APPENDIX C

Superior Court of The State of California

FOR THE COUNTY OF LOS ANGELES

TIMOTHY CURRAN, NATIONAL GAY TASK FORCE,
Plaintiffs-Petitioners,

vs.

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Defendant-Respondent.

No. C 365 529

Memorandum Of Ruling

Plaintiffs Timothy Curran and the National Gay Task Force have heretofore filed a complaint for preliminary and permanent injunction, declaratory relief and damages coupled with a petition for writ of mandate.

The facts as pleaded are the following: Defendant and Respondent Mt. Diablo Council of the Boy Scouts of America is a voluntary, membership, nonprofit California corporation associated with the Boy Scouts of America, a voluntary, nonprofit corporation created by Act of Congress on June 15, 1916. The defendant Council supervises and controls Berkeley Boy Scout Troop 37.

Plaintiff Timothy Curran is an Eagle Scout who joined that Troop in 1975 and participated in all of its activities for five and a-half years.

Plaintiff National Gay Task Force is a nonprofit New York corporation with a largely homosexual membership. 2,000 of its members reside in the State of California and some of them are presently or have been members of or employees of the Boy

Scouts of America (although it is not pleaded that any of them belong to or work for the Mt. Diablo Council, which is the only named defendant and respondent in this action).

In October, 1979, plaintiff became 18 years of age and, by that fact, ineligible to continue as a Boy Scout. Thereafter, he applied to the Mt. Diablo Council for membership as a "Scouter," a leadership position to assist a Scoutmaster in the Boy Scout organization. In addition, on or about July 18, 1980, plaintiff applied for a staff position on the 1981 National Scout Jamboree Journal at the invitation of the national conference newspaper staff advisor.

Meanwhile, on June 29, 1980, plaintiff was interviewed by the Oakland Tribune newspaper because he was considered an example of an outstanding Gay Youth. The interview appeared as part of a series run by the newspaper. In the story, a copy of which is attached to the pleadings, the author described how plaintiff Curran had told his parents about his homosexuality and how he had brought his male friend to his high school senior prom in San Francisco without causing any particular commotion.

On October 5, 1981, plaintiff Curran was advised by the Mt. Diablo Council that his Jamboree Journal application had been denied. On October 6, 1981, he telephoned Mr. Quentin Alexander, Scout executive of the Mt. Diablo Council, to discuss the basis for the denial, and was informed: (1) that he was not a registered Scouter, (2) that his Jamboree Journal application had been denied because he was a homosexual, and (3) that Mr. Alexander had learned of his homosexuality as a result of an article in the Oakland Tribune.

Thereafter, plaintiff Curran sought an appointment with Mr. Alexander to discuss Curran's registration with the Boy Scouts of America. The meeting occurred on November 28, 1980, and was attended by plaintiff Curran, his mother, his stepfather, Mr. Alexander and two other officials of the Mt. Diablo Council. Curran was informed that it was the Mt. Diablo Council's policy not to allow atheists or homosexuals in the organization. The pleading also alleges that Mr. Curran

was informed by Mr. Alexander "that as a homosexual, he was not a good moral example to be emulated by younger Scouts." (Defendant has denied this latter allegation in its answer filed to the petition for the writ of alternative mandate; however, such denial is irrelevant in dealing with the demurrers that have been filed to the pleading which are here being ruled upon.)

On February 14, 1981, plaintiff Curran asked for an administrative review from the Boy Scouts of America Western Region of the decision of the Mt. Diablo Council not to allow him to be employed by or be a member of the Boy Scouts because he was a homosexual. He was told that no further administrative proceedings were necessary because the facts as alleged precluded him from being a Boy Scout.

In his pleading, plaintiff Curran states that he is and at all times has been a homosexual "since his first conscious sexual thoughts." He wishes to continue to make statements to his peers through the press, to associate with other homosexuals, to achieve the status of an adult "Scouter," to apply for a position on the staff of the 1981 Jamboree Journal and to be allowed to attend the 1981 National Jamboree in Virginia.

The other plaintiff, the National Gay Task Force, pleads that it is "interested in advising and counseling its California membership as to whether or not they can be members of or be employed by the Mt. Diablo Council of the Boy Scouts of America."

Based on the foregoing facts as pleaded, the plaintiffs have alleged the existence of the following causes of action:

1. Violation of due process and equal protection of the law contrary to Article I, section 7(a), and Article I, section 15, of the California Constitution and California law, as to both plaintiffs;

2. Interference with the right of privacy (although it cannot be ascertained whether this cause of action is pleaded only on behalf of plaintiff Curran or both plaintiffs) contrary to Article I, section 1, of the California Constitution and California law;

3. Violation of freedom of religion (which appears to be pleaded only on behalf of plaintiff Curran) contrary to Article I, sections 4 and 8, of the California Constitution and California law;

4. Violation of freedom of speech and association (which again appears to be pleaded only on behalf of plaintiff Curran) contrary to Article I, sections 2 and 3, of the California Constitution and California law.

5. Violation of the right to freedom of political activity for employee under sections 1101 and 1102 of the California Labor Code.

6. Defamation.

7. Violation of the Unruh Civil Rights Act, Civil Code section 51.

8. Declaratory judgment.

9. Writ of mandate requiring respondent to reinstate petitioner as a "Scouter" and to permit him to attend the Jamboree and to be on the staff of the Jamboree Journal. Injunctive relief to the same effect is also sought, as well as $20,000.00 in damages for alleged violations of Labor Code sections 1101 and 1102, $20,000.00 in compensatory damages and $250,000.00 in exemplary damages for the alleged defamation, $20,000.00 for the alleged violations of plaintiffs' civil rights under Civil Code section 51 and an additional $20,000.00 and unspecified exemplary damages for continued violation of plaintiffs' civil rights.

To each of the above-stated causes of action defendant-respondent Mt. Diablo Council of the Boy Scouts of America has filed a general demurrer alleging that each purported cause of action fails to state facts sufficient to constitute a cause of action against the defendant.

The Court has been favored with lengthy and well-reasoned briefs by both parties. In the interest of economy and brevity, the Court will only mention a few of the many cases and/or rules cited by the parties for reaching its decision.

1. The demurrer to the first cause of action is sustained without leave per Code of Civil Procedure section 430.10(e). If it were possible to successfully allege the existence of state action involved in the activity of defendant, a cause of action might be stated (*Gay Law Students Association* v. *Pacific Telephone & Telegraph Company* [1979] 24 Cal.3d 458). However, it is not the law that a voluntary association may be forced to open its membership rolls to all who apply except when membership in such an association is a practical economic necessity (*Marin County Board of Realtors Inc.* v. *Palsson* [1976] 16 C.3d 920). Absent state action (which plaintiffs concede in their later memorandum that they cannot establish), this cause of action is governed by the prevailing view that a private, voluntary, charitable membership organization with particular religious, political and cultural purposes and membership policies may not be required by the state to open its membership to all persons, irrespective of religious beliefs and practices, irrespective of sexual preferences, and irrespective of any other "nonfunctional" criterion. The Constitutions, both federal and state, prevent the state from requiring that such action be taken because it would impermissibly infringe upon the individual Boy Scout's right to freedom of association, including the right to associate only with persons of like religious, political and cultural beliefs. Such position was perhaps best stated by Mr. Justice Douglas in *Moose Lodge No. 107* v. *Irvis* [1972] 407 U.S. 163. In that case, the absence of state action as found by a majority of the Supreme Court precluded judicial attack upon the policy of the fraternal lodge that excluded black members. While Justice Douglas, dissenting, would have found state action present, nevertheless he wrote:

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasions to join or come as guests is

> constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race."

This language affirms both the federal and state constitutional rights guaranteeing that persons may associate with persons of their own choice and need not associate with others. "It has never been the law in California that a voluntary association may be forced to open its membership rolls to all who apply" *Marin County Board of Realtors, Inc.* v. *Palsson, supra.*

In a later memorandum, plaintiffs seek to shift gears and, although stated neither in the facts as alleged nor in the remedies sought, attempt to claim that procedural due process was violated because of the lack of a pre-expulsion hearing. The facts as pleaded neither indicate that such relief was requested nor that it would be appropriate or required under the given circumstances.

2. The general demurrers to the second, third and fourth causes of action are each sustained without leave per C.C.P. section 430.10(e) for failure to state a cause of action. The facts as pleaded do not support the contention that there has been any interference with plaintiffs' right of privacy, freedom of religion or freedom of speech and association. Rather, the right of defendant to freedom of association as set forth above in paragraph 1 would appear to govern these causes of action.

3. The demurrer to the fifth cause of action is sustained with leave to amend per C.C.P. § 430.10(e). This cause of action is based on alleged violations of Labor Code §§1101-02. Section 1101 provides:

> "No employer shall make, adopt or enforce any rule, regulation, or policy:
>
> > "(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

"(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

Section 1102 provides:

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Labor Code section 1132.4 defines an "employee" as "any person *who performs services for wages or salary* under a contract of employment, express or implied, for an employer." (Emphasis added.)

Section 3352(i) excludes from its definition of an employee "any person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for such services other than meals, transportation, lodging or reimbursement for incidental expenses."

Labor Code section 6304.1 provides that an employee means "every person who is required or directed by any employer to engage in any employment, or to go to work or be at any time and any place of employment."

Finally, Labor Code section 6303(b), which defines employment for the purpose of section 6304.1, provides " 'employment' includes the carrying on of any trade, enterprise, project, industry, business, occupation or work . . . in which any person is engaged or permitted to work *for hire* . . ." (Emphasis added.)

Thus, it would appear that plaintiff must allege, if he can, that he would have received wages or salary from defendant Mt. Diablo for either the staff position he seeks on the 1981 National Jamboree Journal or for his position as a "Scouter" in order to state a cause of action for violation of these Labor Code sections. See, also, *Gay Law Students Association, supra,* at page 486, where the court noted that the Legislature had enacted these Labor Code sections in order to prevent employ-

ers from misusing their economic power to interfere with the political activities of their employees.

4. The general demurrer to the sixth cause of action for defamation was previously sustained at the hearing on this matter per C.C.P. § 430.10(e) with leave to amend by stipulation of plaintiffs, who agreed that they would amend only if they could find additional facts other than those pleaded which seem to clearly establish the existence of privilege.

5. The demurrer to the seventh cause of action is sustained with leave to amend per C.C.P. § 430.10(e). It is necessary for plaintiff to allege what business establishment of the defendant he was excluded from because of his homosexuality in order to state a cause of action for violation of the Unruh Civil Rights Act. "Business establishment" has been construed as a place which furnishes goods, services or facilities to its clients, patrons or customers (*Alcorn* v. *Anbro Engineering, Inc.* [1970] 2C.3d 493, 500). "Business" is synonymous with "calling, occupation or trade engaged in for the purpose of making a livelihood or gain." (*Burks* v. *Poppy Construction Co.* [1962] 57 C.2d 463, 468. See *Schwenk* v. *Boy Scouts of America* [1976] 275 Oregon 327, 351, in which it was held that the Oregon Public Accommodation Act, similar to California Civil Code section 51, was intended only to prohibit discrimination in business or commercial enterprise, and thus membership in Boy Scouts was not covered.)

6. The remaining causes of action, which include declaratory relief and the petition for writ of mandate, insofar as they are grounded upon the first four causes of action previously described, must therefore fall with those causes of action. Similarly, the requests for preliminary and permanent injunctions, insofar as they are also grounded on causes of action to which demurrers have been sustained without leave, must also be sustained without leave. Parenthetically, it is unclear how plaintiff has or can state a cause of action to "go to the Jamboree" since he has not pleaded a request to go the Jamboree that has been denied, nor that the named defendant has the power or authority to allow him or prevent him from going or not going.

In summary, general demurrers are sustained with leave to the fifth, sixth and seventh causes of action, and without leave to all remaining causes of action. Thirty (30) days to amend.

Responding party to give notice.

DATED: July 7, 1981.

/s/ WEIL

ROBERT WEIL
Judge of the Superior Court

APPENDIX D

IN THE

Court of Appeal of the State of California

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Los Angeles, Cal. November 2, 1983

Title

Curran
v.
Mt. Diablo Council, etc.

No. 66755

PETITION FOR REHEARING DENIED.

CLAY ROBBINS, *Clerk*

APPENDIX E

[Filed January 6, 1984]

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 7 Civil No. 66755

IN THE

Supreme Court of the State of California

IN BANK

CURRAN

v.

MOUNT DIABLO COUNCIL OF
THE BOY SCOUTS OF AMERICA

MOSK, J., DID NOT PARTICIPATE

Respondent's petition for hearing DENIED.

/s/ BIRD

Chief Justice

APPENDIX F

[Filed February 10, 1984]

IN THE

Court of Appeal

SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

TIMOTHY CURRAN,
Plaintiff-Appellant,

vs.

MT. DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Defendant-Respondent.

2d Civ. No. 66755

Notice Of Appeal

Appeal From
Superior Court Of Los Angeles County
Honorable Robert Weil, Judge

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Attorneys for
Defendant-Respondent
Mt. Diablo Council of the
Boy Scouts of America

NOTICE OF APPEAL

Notice is hereby given that the Mt. Diablo Council of the Boy Scouts of America, defendant-respondent in the above-captioned case, appeals this Court's decision of October 3, 1983, to the Supreme Court of the United States. This appeal is taken under the provisions of 28 U.S.C. § 1257(2).

Dated: February 9, 1984

Respectfully submitted,

HUGHES HUBBARD & REED
MALCOLM E. WHEELER

By /S/ MALCOLM E. WHEELER
Malcolm E. Wheeler

Attorneys for
Defendant/Respondent
Mt. Diablo Council of the
Boy Scouts of America

No. 83-1513

IN THE

Supreme Court of the United States

October Term, 1983

MT. DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

vs.

TIMOTHY CURRAN,
Appellee.

On Appeal From the Court of Appeal of California Second Appellate District.

MOTION TO DISMISS.

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No. 83-1513

IN THE

Supreme Court of the United States

October Term, 1983

MT. DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

vs.

TIMOTHY CURRAN,
Appellee.

MOTION TO DISMISS.

Pursuant to Rule 16 of the Rules of this Court, Appellee moves to dismiss the appeal herein upon the ground that the appeal is not within this Court's jurisdiction and does not present a substantial federal question.

ARGUMENT.

The Proceedings Below.

This case is not yet at issue. Appellant's demurrer to Appellee's Amended Complaint was sustained by the Los Angeles Superior Court. The judgment of that Court was reversed by Division Seven of the California District Court of Appeal in an opinion printed as Appendix A to Appellant's Jurisdictional Statement (hereafter "Jurisdictional Statement"). Hearing was denied by the California Supreme Court without opinion (Jurisdictional Statement, App. E).

The Amended Complaint is set out in the Appendix hereof. It pleads two causes of action.

The First Cause of Action pleads that Appellee was arbitrarily expelled from Boy Scouts of America because he was a homosexual and thus, according to Appellant, not a good moral example for younger Scouts and could not have "Scouter" (adult leadership) status for which he had applied. This count also pleads that there is no membership requirement of Boy Scouts of America that a member may not be homosexual. It also incorporates into its pleading, as does the Second Cause of Action, Appellant's statement that "Boy Scouts is a private membership organization free to associate itself with, and to disassociate itself from, whomever it may choose."

No state statute is involved in the First Cause of Action. It is strictly a common law action stemming from *Dawkins v. Antrobus* (1881) 17 Ch.D. 615 and embodied in a long line of California cases beginning with *Otto v. Journeymen Tailors' Protective and Benevolent Union* (1888) 75 Cal. 308, 17 P. 217. The holding of the District Court of Appeal was that Appellee had "stated a valid claim for wrongful denial of the common law right of fair procedure in his first cause of action." (Jurisdictional Statement, App. 11a).

The Second Cause of Action was based upon the Unruh Civil Rights Act (Cal. Civil Code, §51). The applicable text of the Act states:

> "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever."

The District Court of Appeal considered the cases involving California's earlier public accommodations statute, the legislative history of the Unruh Act, and the California cases since its enactment in 1957 as well as the criteria established in other cases.[1] While the Court concluded that the Legislature was precluded from "enacting anti-discrimination laws where *strictly* [emphasis the Court's] private clubs or institutions are affected",[2] it held "that the concept of organizational membership per se cannot place an entity outside the scope of the Unruh Act unless it is shown that the organization is truly private."[3]

The Court's final conclusion was that:

> "We therefore conclude that the term 'business establishments', consistent with the Legislature's intent to use the term in the broadest sense reasonably possible, includes all commercial and non-commercial entities open to and serving the public. Accordingly, we hold

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[1] *Tillman v. Wheaton Haven Recreation Assn. Inc.* (1973) 410 U.S. 431; *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229; *Nesmith v. Young Men's Christian Assn.* (4th Cir. 1968) 397 F.2d 96; *Cornelius v. Benevolent Protective Order of Elks* (D. Conn. 1974) 382 F.Supp. 1182; *Wright v. Cork Club* (S.D. Tex. 1970) 315 F.Supp. 1143; *National Organization for Women v. Little League Baseball Inc.* (1974) 127 N.J. Super. 552, 318 A.2d 33 (Jurisdictional Statement, App. 18a-19a).

[2] Jurisdictional Statement, App. 17a.

[3] *Id.* 19a.

the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act."[4]

No Final Judgment or Decree.

While for purposes of 28 U.S.C. 1257, the District Court of Appeal may here be "the highest court of [the] state", there has been no "final judgment or decree" rendered by it.

Appellant recognizes (Jurisdictional Statement, pp. 3-5) that there is no "final" judgment or decree in the accepted sense of the word. It then presents a two-pronged argument — the order of the Court is final because its opinion is the "law of the case", but if it is not final it comes within the exceptions, notably the fourth category, to the requirement of finality set out in *Cox Broadcasting Company v. Cohn*, 420 U.S. 469, 482-87 (1975) and re-enunciated in *Southland Corp. v. Keating*, ___ U.S. ___, ___, 52 U.S.L.W. 4131, 4133 (January 23, 1984).

We examine first Appellant's "law of the case" argument.

There was no opinion of the California Supreme Court here. Had the Supreme Court rendered an opinion which upheld the constitutionality of the Unruh Act as applied to Appellant there would, at least, have been a judgment or decree of the highest court of the state which, although not "final", still might serve as a basis for a determination of whether it came within an applicable *Cox Broadcasting* exception.

But even that is lacking here, for while the District Court of Appeal decision may be binding upon the California trial court and *generally* upon this particular division of the Court of Appeal of the Second Appellate District, it is, at most,

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[4]*Id.* 19a.

only persuasive upon the coordinate courts in the state. And although the coordinate courts of appeal may choose to follow the court below, they need not.[5]

Similarly, while the California Supreme Court may find the decision of the court below correct, it need not, and is not bound by it. The denial of a hearing by the California Supreme Court does not necessarily mean approval of the Court of Appeal's decision.

The denial of a hearing by the California Supreme Court "is not to be taken as an . . . affirmative approval by this court of any proposition of law laid down in such opinion [of the District Court of Appeal] . . . . The significance of such refusal is no greater than this — that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case." *People v. Davis* (1905) 147 Cal. 346, 350, 81 P. 718.

People v. Davis was decided by the California Supreme Court the year after the adoption of the 1904 amendment to Article VI of the California Constitution[6] and the Court

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[5]Witkin, *California Procedure* 2d Edition (1971) Vol. 6, p. 4580: "A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior district or division . . . ."

Swinerton & Walberg Co. v. Inglewood (1974) 40 Cal.App.3d 98, 101, 114 Cal.Rptr. 834: "This precise question has been answered in the negative by the Third District of this statewide court less than four years ago in *Rubino v. Lolli*, 10 Cal.App.3d 1059. That decision, of course, is not binding upon us."

Accord: *Estate of Toy* (1977) 72 Cal.App.3d 392, 396, 140 Cal.Rptr. 183; *Van Goalen v. Superior Court* (1978) 80 Cal.App.3d 371, 376; *People v. Yeats* (1977) 66 Cal.App.3d 874, 879, 136 Cal.Rptr. 243; *Theresa Enterprises v. David* (1978) 81 Cal.App.3d 940, 947, 146 Cal.Rptr. 802; *Bridges v. Bridges* (1978) 82 Cal.App.3d 976, 978, 147 Cal.Rptr. 471.

[6]Section 4 — "Supreme Court; jurisdiction. . . . the said [Supreme] court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and disposition, as hereinafter provided."

pointed out (*Id.*), "We state this rule in this case because it is the first case which has come before this court upon an application for such a transfer [*i.e.*, hearing] and because we desire to lay down a precedent in order that parties concerned, as well as the district courts of appeal, may understand and appreciate their respective rights, duties, and responsibilities."

Even as to the Division of the Court of Appeal which rendered the decision, Witkin's *California Procedure* (2d Ed. 1971, Vol. 6, §650, p. 4568) states the applicable law as follows:

> "It has been seen that the later California decisions view the doctrine [of 'the law of the case'] as one of *policy* (emphasis in the text) only, to be disregarded when compelling circumstances call for a redetermination of the point of law determined on a prior appeal (see, *supra*, §636)."

In section 636 (p. 4555) under the heading "Modern Rule of Policy, Departure by Appellate Court", Witkin states:

> "The later decisions not only recognize several kinds of exceptions to the application of the doctrine (see *infra*, sec. 650, *et seq.*), but also reject the notion of limited power (*supra*, sec. 635) and treat the doctrine as merely one of policy and normal practice."

Witkin there refers to *England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 97 P.2d 813 as "The leading case stating the modern approach". In that case, the California Supreme Court set out the law as follows:

> "The doctrine of the law of the case is recognized as a harsh one (2 Cal.Jur. 947) and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision . . . [A] court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former

appeal. Procedure and not jurisdiction is involved." (p. 795.)

In *Messinger v. Anderson*, 225 U.S. 436 (1912) this Court stated (p. 444):

> "In the absence of statute, the phrase, 'law of the case', as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to open what has been decided, not a limit to their power."

The basic principle laid down in *England v. Hospital, supra*, has been followed consistently by the California Supreme Court in all aspects.

> ". . . [T]he doctrine of the law of the case . . . is merely a rule of procedure and does not go to the power of the court . . ." *DeGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179, 367 P.2d 865, 18 Cal.Rptr. 369.

See also:

Gore v. Bingamen (1942) 20 Cal.2d 118, 120, *et seq.*, 124 P.2d 17;

Vangel v. Vangel (1955) 45 Cal.2d 804, 809-10, 291 P.2d 25;

People v. Medina (1975) 6 Cal.3d 484, 492, 492 P.2d 686, 99 Cal.Rptr. 630.

The "law of the case" cases cited by Appellant at pages 3-4 of its Jurisdictional Statement do not in the slightest conflict with the holding of the California Supreme Court that that doctrine is one of "procedure and not jurisdiction". (*England v. Hospital, etc., supra*, 14 Cal.2d 791, 795). Thus, while the decision of the District Court of Appeal may, indeed, be the law of the case as between Appellant and Appellee in Division Seven of the District Court of Appeal, Second Appellate District, it is not the *final judg-*

ment even of that court and certainly not of the highest court of the State of California.

It may also be noted that the California Supreme Court in *Atchison, Topeka and Santa Fe Railway Company v. Railroad Commission of the State of California* (1930) 209 Cal. 460 [affirmed (1931) 283 U.S. 380], said at page 472; "The doctrine of the law of the case applies only to the decision of the highest court on the particular issue under consideration. Where this issue involves the construction of the Constitution or statutes of the United States, the highest Court is the Supreme Court of the United States, and, hence, the doctrine of 'the law of the case' does not apply [even] to a decision of the state Supreme Court."

It is thus clear that there is no final judgment or decree of the highest court of California in which a decision could be had to give this Court jurisdiction to entertain Appellant's direct appeal.

The Case Does Not Come Within the *Cox Broadcasting* Exception.

Citing *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 and *Southland Corp. v. Keating*, ___ U.S. ___, 52 U.S.L.W. 4131, Appellant seeks to come within the fourth category of exceptions to the finality requirement set out in *Cox*. "Failure to accept jurisdiction at this juncture", Appellant asserts, "will 'seriously erode' fundamental federal policies". (Jurisdictional Statement, pp. 4-5).

However, the fact is that no federal policy will be eroded in the slightest by this Court's appropriate refusal to accept jurisdiction of Appellant's appeal at this time.

In its present posture, this case falls directly within the Court's opinion in *Flynt v. Ohio*, 451 U.S. 619 (1981), where the Court, accepting the premise of *Cox Broadcasting*, held that its refusal to accept jurisdiction would not

"seriously erode federal policy within the meaning of our prior cases" (451 U.S. at 622). Precisely the same is true here.

Appellant's claim is based upon its unsound theory of the application of the "law of the case" doctrine and its incorrect characterizations of the opinion of the Court below and the effect of its decision.

Appellant persists in asserting that the opinion below applies to "*any* nonprofit membership association" (Jurisdictional Statement, p. 11) and to "*All* private membership organizations in California" (*Id.* p. 4, emphasis ours). With that as a premise, Appellant proceeds to find a substantial constitutional problem involved and to raise the spectre of serious erosion of federal policy if this Court does not rush to assume jurisdiction.

However, the District Court of Appeal stated as clearly as possible that the Unruh Act *did not* apply to private clubs or organizations.

There is no federal policy which might be eroded, let alone "seriously", by the holding of the Court below (1), that by common law principles generally applicable within the state one may not be arbitrarily expelled from an organization whose membership requirements and rules and regulations he has not violated and (2), that an anti-discrimination statute, which embodies state policy similar to federal policy,[7] applies to an organization which is not private and which is encompassed within the language of the statute.

Appellant throughout proceeds on the *ipse dixit* that it is a private organization and that the decision of the District Court of Appeal applies to private organizations. Upon this

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[7]42 U.S.C. 2000a *et seq.*

groundless assumption it builds its claim that "failure to accept jurisdiction at this juncture, therefore, will 'seriously erode' fundamental federal policies". (Jurisdictional Statement, pp. 4-5).

Appellant insists that "all private membership organizations in California will have to operate in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." (Jurisdictional Statement, p. 4). Leaving aside the question of whether the constitutionality of the California common law doctrine and the state's Unruh Act is in any, let alone serious, doubt, *no private* organization in California need operate "in the shadow" of the Unruh Act and no private organization in California need refrain from any action it may choose except such arbitrary action as violates an individual's basic right to fair dealing.

There is no federal policy which holds that an individual may be arbitrarily expelled from an organization of which he is a member, none of whose membership requirements or rules and regulations he has violated. Not even Mr. Justice Douglas' dictum in *Moose Lodge v. Irvis* (1972) 407 U.S. 163, 179-180, suggested that a white or black or brown or yellow, or Catholic or Jewish or agnostic club *could arbitrarily expel* a member who had met all membership requirements and who had not violated any rules of the organization.

In its "STATEMENT" Appellant asserts:

> "On Curran's appeal the Court of Appeal reversed. The court concluded that, simply because of its large membership, the Boy Scouts is 'open to and serving the general public' and is therefore, a 'business establishment' within the meaning of the Unruh Act. (App. 19a) It also ruled that the Unruh Act prohibits *any* nonprofit membership association from barring *any*

'class of persons' from membership in the exercise of the judgment that their admission would be inconsistent with the nature or purposes of the organization. (App. 20a) The court opined, therefore, that the Unruh Act prohibits the Boy Scouts (and other membership associations) from excluding homosexuals from membership (App. 21a)" (Jurisdictional Statement, p. 11, Emphasis Appellant's).

On this premise, Appellant proceeds to argue that "THE QUESTIONS ARE SUBSTANTIAL".

None of Appellant's statements about what the court "concluded," "ruled", or "opined" is correct.

First: The Court did not conclude that the Boy Scouts was open to and serving the general public and was therefore a business establishment, "*simply because of its large membership.*" Instead, the Court pointed out that it was necessary first "to determine the intended use of the word 'business' as used by the legislature" (Jurisdictional Statement, App. 13a); then to examine the California cases interpreting that language (*Id.* 14a-16a); then to determine "whether a group is private or public" (*Id.* 18a). Upon the basis of all that analysis, and without even mentioning the Boy Scouts' "large membership", let alone grounding its conclusion "simply" on such a fact, the Court concluded that Appellant fell within the ambit of the Unruh Act.

Second: The Court did not rule "that the Unruh Act prohibits *any* nonprofit association from barring *any* 'class of persons' from membership in the exercise of the judgment that their admission would be inconsistent with the nature or purposes of the organization". Its ruling applied not to "*any* nonprofit organization", but only to nonprofit organizations that *were not private* and came within the definition of the Unruh Act.

Third: The Court did not opine that the Unruh Act prohibits "other membership organizations" than the Boy Scouts "from excluding homosexuals from membership". Here, too, the Court's conclusion that "the Unruh Act prohibits arbitrary discrimination against homosexuals" (Jurisdictional Statement, App. 21a), similarly applies *only* to such "other membership organizations" as are not private and come within the definition of the Unruh Act.

Again, in the attempt to lean upon some fundamental federal policy which would be "seriously erode[d]" if the Court were not to act now, the Appellant states that,

> "[T]he California common law rule applied now prevents the Boy Scouts and other private membership organizations from excluding a person from membership unless the organization can first prove that particular conduct of that person actually would 'harm' the group. (App. 10a-11a) This test would, for example, prohibit a Jewish synagogue from excluding Christians from membership unless, because of some conduct, their presence would demonstrably 'harm' the congregation. The local Democratic Party could not exclude Republicans without shouldering a similar burden." (Jurisdictional Statement, p. 16).

Not at all. Neither the California common law rule applied by the Court below nor the Unruh Act test would prohibit a Jewish synagogue from excluding Christians from membership or the local Democratic Party from excluding Republicans without shouldering any burden whatever. The law applicable to such organizations is to be found in *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 743 which recognizes the right of "specialized institution[s] designed to meet a social need" to "promulgate reasonable . . . regulations that are rationally related to the services performed . . ." *In re Cox* (1970) 3 Cal.3d 205, 217.

Subject to the same basic error is Appellant's discussion of the "Absence of Compelling Interest" (Jurisdictional Statement, pp. 19-21).

Appellant asserts that a "governmental interest in ending 'discrimination' against homosexuals . . . would enable the States to require individual citizens to refrain from 'discrimination' even in inviting persons into their homes . . ." (Jurisdictional Statement, p. 19).

This is utter nonsense both as a general statement and as applied to the holdings of the Court below. Nothing in the opinion below or in any California case or statute contains or implies any such holding.

Appellant states that California's interest in preventing discrimination — which, it may be noted, includes preventing discrimination on the basis of sex, race, color, religion, ancestry or national origin, as well as sexual preference — is "weak indeed" (Jurisdictional Statement, p. 20), for Boy Scouts is a bona fide membership organization with a particular set of values and a specific educational purpose. (*Id.*).

The fact that it is a bona fide membership organization with a particular set of values and a specific educational purpose in no way imports that the decision of the Court below would in any way erode fundamental federal policy. On the contrary, the federal cases set out in footnote 1, *supra*, make clear that membership organizations such as YMCA, with "a particular set of values" similar to that claimed by Appellant, or such as Elks, with a claimed similar set of values applicable to adults, and others like them, are equally subject to the federal anti-discrimination policy set out in 42 U.S.C. 2000a *et seq.* (We do not here comment on the "particular set of values" which Appellant asserts as permitting it to be "free to associate itself with, and

disassociate itself from, whomever it may choose." App.)

Appellant similarly misstates the effect of the Court's decision when it says (Jurisdictional Statement, p. 21), "The State, according to the Court below, may prohibit all membership criteria based on any 'classifications' of people", and this "presumptively outlaws all ethnic, religious, hereditary or professional associations and societies unless they prove that the 'conduct' of 'outsiders' would demonstrably 'harm' their organizations". But the Court below held only that organizations *which are not private* may not establish individual membership criteria which are outlawed by the Unruh Civil Rights Act. That and no more.

The same misstatement of the Court's ruling may be found at page 24 of the Jurisdictional Statement in Appellant's stricture about "California's application of its common law rule to *any* (emphasis Appellant's) private membership groups . . .".

The matter of whether or not the Boy Scouts or other organizations chartered by Congress may exclude persons from membership on the basis of sex (Jurisdictional Statement, pp. 22 and 25) was not before the Court below nor considered or decided by it.

The blunderbuss charge, made at the conclusion of Appellant's Jurisdictional Statement (p. 25) in connection with its assertion that this case presents an important Supremacy Clause issue, in that "if the decision below is allowed to stand it would allow the State to force the restructuring of those congressionally chartered associations as well" is utterly without merit. Each one of the organizations set out there must be considered in the light of its purposes or its membership requirements, or both, as set down in each Act of Congress creating it. None of them was involved in this case. All that was involved was the Boy Scouts of America

as created by its own Act of Congress, none of the terms of whose charter in any way inhibited the application to Appellant of this state's anti-discrimination law.

Finally, we must take exception to the grossly misleading implication in Appellant's adroitly worded statement with regard to the *Schwenk* case in Oregon. Appellant states (Jurisdictional Statement, p. 24),

> "In Oregon, for example, faced with the same federal constitutional concerns brushed aside (sic) by the California court, the Supreme Court of Oregon interpreted its public accommodations statute as inapplicable to the Boy Scouts' membership policies. *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976)."

The fact is that there is not a single word in the decision of the Oregon Supreme Court which even mentions the "federal constitutional concerns" to which Appellant refers. That case was decided on one basis and one basis only, namely that the legislative history of the Oregon statute established to the Court's satisfaction that the legislature did not intend to include the Boy Scouts within its scope.

Conclusion.

The motion to dismiss the appeal should be granted.

Dated: April 13, 1984.

Respectfully submitted,

GEORGE SLAFF,
Counsel of Record,
FRED OKRAND,
SUSAN MCGREIVY,
Attorneys for Appellee
Timothy Curran.

APPENDIX.

Amended Complaint and Petition for Writ of Mandate, and for Preliminary and Final Injunction.

Superior Court of California, County of Los Angeles.

Timothy Curran, et al., Plaintiff-Petitioner, vs. Mount Diablo Council of the Boy Scouts of America, Defendant-Respondent. No. C 365 529.

Fred Okrand, Esq., Susan McGreivy, Esq., ACLU Foundation of Southern California, 633 South Shatto Place, Los Angeles CA 90005, 213/487-1720, Barry Copilow, Esq., 8383 Wilshire Blvd., Ste. 215, Beverly Hills CA 90211, 213/652-9915, George Slaff, Esq., Slaff, Mosk & Rudman, 9200 Sunset Blvd., Ste. 825, Los Angeles CA 90069, 213/275-5351, Attorneys for Plaintiff-Petitioner Timothy Curran.

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff, TIMOTHY CURRAN, is a resident of Los Angeles County.

2. Defendant, MOUNT DIABLO COUNCIL, BOY SCOUTS OF AMERICA (hereafter "Mt. Diablo Council"), is a part of Boy Scouts of America, an organization created pursuant to 36 U.S.C.A. 21-29.

3. For over five years immediately prior to November 28, 1980, plaintiff was a member in good standing of Troop 37, Berkeley, California, of the Mt. Diablo Council and had attained the rank of Eagle Scout. Prior to November 28, 1980, plaintiff's Scoutmaster had forwarded to Mt. Diablo Council an application requesting that the Council approve plaintiff as a "Scouter" in order that plaintiff might assist the Scoutmaster in a leadership capacity. "Scouters" are members of Boy Scouts of America. Such applications are uniformly automatically approved for those who have

attained the rank of Eagle Scout.

4. On or about October 6, 1980, one Quentin Alexander (hereafter "Alexander"), Scout Executive of Mt. Diablo Council and authorized and empowered to act on its behalf, informed plaintiff that he was advised that plaintiff was a homosexual and thus was ineligible for "Scouter" status.

5. On November 28, 1980, plaintiff met with Alexander and was told by Alexander, acting on behalf of Mt. Diablo Council, that because he was a homosexual and thus not a good moral example for younger Scouts, he was no longer a member of the Boy Scouts of America and could not have "Scouter" status.

6. Prior to his expulsion from Boy Scouts of America, as set forth in paragraph 5 hereof, plaintiff was not informed that a requirement of membership in Boy Scouts of America was that one not be a homosexual or that homosexuality was a reason for terminating one's membership. In fact, there is no such membership requirement. Plaintiff was not given any opportunity, before being expelled, to present evidence to Mt. Diablo Council that there was in fact no such membership requirement. Plaintiff was not informed, prior to the meeting set forth in paragraph 5 hereof that he was deemed not to be a good moral example for younger Scouts and that this would be a basis for his expulsion from membership in Boy Scouts of America. At said meeting at which he was expelled, plaintiff was not given any opportunity to offer proof that his conduct as a Scout and as a human being, with or without reference to his sexual preference, had established, and would continue to demonstrate, that he was a good moral example for younger Scouts and that he was, in every way, trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent and that he had done and intended on his honor in the future to do his best to do his duty to God

and his country and to obey the Scout Law and to help all other people at all times and to keep himself physically strong, mentally awake and morally straight. ["Morally Straight — You live and act and speak in ways that mark you as a boy who will grow up to be a man of good character. You are honest, clean in speech and actions, thoughtful of the rights of others, and faithful to your religious beliefs." — Scout Handbook, Boy Scouts of America, Eighth Ed. Pg. 37.]

7. Prior to his expulsion, plaintiff was given no opportunity to know who, other than Alexander, alleged that a membership requirement of Boy Scouts of America was that a member must not be a homosexual, nor to cross-examine said Alexander or any other person so alleging, nor an opportunity to present evidence that there was no such membership requirement. Prior to said expulsion, plaintiff was given no opportunity to know who, other than Alexander alleged that he was not, or would not be, a good moral example for younger Scouts and was not given any opportunity to cross-examine Alexander or any other person so alleging. Plaintiff is, and always has been, a good moral example for younger Scouts.

8. At the meeting referred to in paragraph 5 herein, plaintiff was also informed by Alexander, acting on behalf of Mt. Diablo Council, that it was the policy of Mt. Diablo Council not to permit atheists to be members of Boy Scouts of America. Based thereon, it is plaintiff's belief, that one of the bases for his expulsion by Mt. Diablo Council from membership in Boy Scouts of America was the belief that plaintiff is an atheist. Plaintiff is not an atheist. Prior to his expulsion, plaintiff was not given an opportunity to know who, other than Alexander, alleged that he was an atheist or to cross-examine Alexander or any person so alleging, or to present proof that he was not an atheist.

9. After being expelled by Mt. Diablo Council from Boy Scouts of America, plaintiff made written request to Western Region of Boy Scouts of America, of which Mt. Diablo Council is a subordinate body, for administrative review of the decision of Mt. Diablo Council. The reply of Western Region, by its attorneys, is attached hereto as Exhibit A. Said reply made clear that any such review would be a futile exercise since plaintiff did not propose to prove that the only fact that he had previously had an opportunity to provide, namely, that he was a homosexual, was untrue. No other administrative remedy is or was available to plaintiff and, as a consequence thereof, all administrative remedies have been exhausted.

10. Membership in Boy Scouts of America is of considerable financial value to members. It permits members, and only members, to wear the Boy Scout uniform and thus to be recognized by this means alone, by non-members as well as other members, as one who belongs to an organization generally held in high regard. Membership in Boy Scouts of America gives a member greater access to, and opportunity for, employment. Membership in Boy Scouts of America, and particularly holding the position of "Scouter", is a valuable asset in application for admission to institutions of higher learning, and to graduate schools leading to professions, and is a favorable factor in the consideration of such an application by admissions officers or committees of such institutions. Membership in Boy Scouts of America in a position of leadership such as "Scouter" is a valuable financial asset in that it is often a factor in one's employment and advancement in employment in the business world and results in higher financial reward to such an individual than he would otherwise receive.

11. The action of Mt. Diablo Council in expelling plaintiff from membership in Boy Scouts of America and in

denying him the opportunity to be a "Scouter" was arbitrary, capricious, unreasonable and contrary to law in that, as set out above, plaintiff was not given notice of the charges against him and was not given an opportunity to examine and refute the alleged evidence against him, and was expelled from membership without any basis for such expulsion.

FOR A SECOND CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE SECTION 51, THE "UNRUH CIVIL RIGHTS ACT".

12. Plaintiff repeats each and every allegation set forth in paragraphs 1 through 11 with the same force and effect as if set forth here[illegible] length.

13. Boy Scouts of America is the owner of the copyright on the Boy Scouts emblem and the Boy Scouts uniform. Boy Scouts of America franchises, to retail chains, department stores and other retail outlets and business establishments throughout the United States, the sale of the Boy Scouts uniform, the Boy Scouts emblem and a wide range of materials and equipment bearing the Boy Scouts emblem. Included among such materials and equipment are ties, caps, shorts, belts, buckles, kerchiefs (hand and neck), canteens, vitt'l kits and litt'l vitt'l kits, model racing cars, berets, compasses, grooming kits, nail clippers and comb packets, space derby toys, regatta model kits, cooking kits. Boy Scouts of America derives great financial revenue from said franchises. The Boy Scouts of America buys from various suppliers many articles such as those set forth above, as well as others, running into millions of dollars per year, and sells the same to retail outlets, such as those set forth above, at a profit and derives great financial revenue from such transactions. The Boy Scouts of America maintains a large buying and sales force in connection with the matters

set forth in this paragraph.

14. Boy Scouts of America is engaged in the book publishing business and publishes and sells throughout the nation a vast variety of books of which it is the copyright owner. Among such books are: Bear Cub Scout Book, Webelos Scout Book, Troop Committee Guide Book, Wolf Cub Scout Book, Patrol and Leadership, Scoutmaster's Handbook, Staging Den and Pack Ceremonies, Scout Handbook, Troop Committee Guidebook, Webelos Den Leader's Book, Leadership Corps, as well as books on Geology, Surveying, Personal Fitness, Sports, Machinery, Metals Engineering, Salesmanship, Journalism. Boy Scouts of America derives great financial revenue from said publishing business.

15. Boy Scouts of America and Mt. Diablo Council, as a part of Boy Scouts of America, are business establishments.

16. The Mt. Diablo Council maintains, and has maintained for many years, a shop in Walnut Creek, California, where it engages in the retail sale to the public of a variety of different items. Among the items on sale in said shop are the following, representing but a sampling of the stock of said retail store:

—Mt. Diablo Council Mugs
—Miniature Flags, BSA and USA
—Various awards
—Scout charms for bracelets
—Scout Handbooks
—Scout Fieldbooks
—Scoutmaster Handbooks
—Cub Scout Magic book
—Craft & Games idea books
—Space Derby woodcarving-craft set
—Pinewood Derby woodcarving-craft set
—Beginner's compass
—Campaign Hats
—American Flag patches
—Leather belts
—Scouts pens
—Mr. Diabo Council T-shirts

Purchasing for this store is done by the Mt. Diablo Council

acting through its agents and employees. The Mt. Diablo Council employs sales people in said store. The goods and books sold in the store are sold at prices over and above their cost to Mt. Diablo Council, which prices are designed and aimed to bring to Mt. Diablo Council essentially the same amount of profits on its sales as would be made by any similar retail establishment selling the same type of goods to the general public.

17. Mt. Diablo Council is a business establishment.

18. Homosexuals and heterosexuals alike in California are entitled to the full and equal advantages, facilities, privileges or services in all business establishments of every kind whatsoever.

19. By expelling plaintiff from membership in Boy Scouts of America on the ground that he is a homosexual, Mt. Diablo Council has denied plaintiff the full and equal advantages, facilities, privileges and services of and in Mt. Diablo Council. Said denial was arbitrary, unreasonable and capricious and in violation of Section 51 of the California Civil Code.

WHEREFORE, plaintiff respectfully requests:

(1) That this Court issue a writ of mandate requiring Mt. Diablo Council to reinstate petitioner as a member of the Boy Scouts of America and to allow him status as a "Scouter" or, in the alternative, to show cause at trial why petitioner should not be so reinstated as a member of Boy Scouts of America and allowed said status as a "Scouter";

(2) That the Court issue a preliminary injunction and a permanent injunction enjoining respondent from interfering with petitioner's rights under the Unruh Civil Rights Act and directing respondent to reinstate petitioner as a member of the Boy Scouts of America and to allow him the status of "Scouter";

(3) For damages for violation of his rights under the Unruh Civil Rights Act, as the proof may show but in no event less than Two Hundred Fifty ($250.00) Dollars;

(4) For attorney's fees and costs;

(5) For such other and further relief as to the Court may seem just and proper.

DATED: August 5, 1981.

FRED OKRAND
SUSAN McGREIVY
BARRY COPILOW
GEORGE SLAFF
By/s/ George Slaff
GEORGE SLAFF, Attorneys for
Plaintiff TIMOTHY CURRAN

EXHIBIT A

[LETTERHEAD]

March 13, 1981

Barry L. Copilow, Esq.
Suite 215
8383 Wilshire Boulevard
Beverly Hills, CA 90211

Dear Mr. Copilow:

The issues of Mr. Timothy A. Curran's application to participate as a journalist on the 1981 National Jamboree *Journal* and of his continued association with the Boy Scouts of America have been referred to this office. I have been informed that you will be representing Mr. Curran in any further proceedings.

On February 14, 1981, by a letter addressed to Mr. Richard Harrington, Mr. Curran personally requested to have a hearing held in order to appeal the decision of the Mt. Diablo Council denying his application to participate as a journalist on the 1981 National Jamboree *Journal*. If Mr. Curran still wishes a hearing, Boy Scouts is willing to conduct one.

The holding of such a hearing, however, is unnecessary unless Mr. Curran believes that there is some misunderstanding of underlying facts. Boy Scouts is a private membership organization free to associate itself with, and to disassociate itself from, whomever it may choose. On the basis of facts provided by Mr. Curran, Boy Scouts has decided not to continue its association with him. Only if he now contends, and hopes to prove, that the facts previously provided by him are untrue could a hearing be productive. If that is what Mr. Curran seeks to accomplish, please contact me to initiate the Boy Scouts' appellate procedure.

Yours truly,

/s/ Malcolm E. Wheeler
Malcolm E. Wheeler

MEW:dg

No. 83-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

v.

TIMOTHY CURRAN,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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The Mount Diablo Council of the Boy Scouts of America ("the Council") files this brief in opposition to Timothy Curran's Motion to Dismiss.[1]

ARGUMENT

Curran makes no effort to argue that this appeal fails to present a substantial federal question. Instead, he asserts only that the decision below is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. As the Council's Jurisdictional Statement explains, however, the decision of the Court of Appeal falls squarely within the statutory test of finality, as amplified by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See* JS 2-6.[2]

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[1] The listing required by Supreme Court Rule 28.1 appears in the footnote on page i of Appellant's Jurisdictional Statement.

[2] Citations to "JS" in this brief are to the Council's Jurisdictional Statement. "JS App." refers to the Appendices to the Statement.

1. Curran concedes that the Court of Appeal explicitly stated that the Boy Scouts of America is a "business establishment" within the meaning of the Unruh Act, California Civil Code § 51, and that the statute hence prohibits the Boy Scouts from excluding a person from membership because he is a homosexual. Motion To Dismiss at 3-4. In addition, the court below stated with equal clarity that, under common law principles, *no* private organization may expel a member because he is a homosexual. *See* JS App. 8a-10a. Curran also does not dispute that, in reaching those conclusions, the court addressed and rejected the Council's constitutional objections to application of the statute and common law as so construed. *Id.* 16a-19a, 21a. There is nothing tentative or contingent about the state court's decision that, despite these constitutional objections, the Unruh Act and the State's common law control the membership policies of the Boy Scouts.

Nevertheless, Curran argues that the decision below is not final within the meaning of 28 U.S.C. § 1257 because the state courts have the power to reconsider the holding on a later appeal and this case does not fall within any "exception" to the statutory requirement of finality set out by this Court in *Cox Broadcasting*. Motion to Dismiss at 4-15.

In *Cox Broadcasting*, however, this Court did not set out an exception to the finality requirement; rather, the Court analyzed the circumstances in which a decision that does not end the litigation nevertheless constitutes a "final" decision of the federal claims. The Court held that the term "final judgment" as used in Section 1257 does not require that the state court proceedings be at an end. 420 U.S. at 477. The Court did not hold that the state court must be powerless to reconsider its determination. Instead, the Court allowed the appeal on the ground, *inter*

alia, that the state court's decision on the federal issues was, as a practical matter, "plainly final." *Id.* at 485.

Here, the decision below is "plainly final" in the same sense, particularly in light of the California Supreme Court's denial of review. Curran does not address the decisions cited in the Jurisdictional Statement showing, once the California Supreme Court has denied review, as here, that the Court of Appeal will adhere to its own ruling during any later appeal absent truly extraordinary circumstances, that other California courts will treat the decision below as settling these constitutional issues unless and until the California Supreme Court chooses to overrule the decision, and that on a later appeal the California Supreme Court itself ordinarily will treat the issues as if they had been finally decided on the merits. JS 3-4.

As explained in the Jurisdictional Statement, the other factors on which this Court relied in *Cox Broadcasting* in determining whether a case falls within the Court's appellate jurisdiction are all present in this case: (1) if the Court of Appeal's ruling on the constitutional issues was erroneous, there should be no trial at all; (2) if the Council prevails on a non-constitutional ground at trial, the decision below will remain as precedent, binding the state courts and casting a shadow over other membership associations in similar circumstances; and (3) failure to accept review at this juncture, and leaving this possibly erroneous precedent to stand, will threaten substantial erosion of a fundamental federal policy—in *Cox Broadcasting*, the freedom of speech; in this case, the freedom of association. *See* JS at 4-5.

2. Curran also argues that no significant federal policy within the meaning of *Cox Broadcasting* is at issue in this appeal. His argument rests on an attempt to downplay the impact of the California Court of Appeal's decision. He repeatedly insists, for example, that the the decision below will not significantly affect the freedom of

association because the ruling excludes "*strictly* private clubs or institutions" from the statute's reach (JS App. 17a). Motion To Dismiss at 10-11, 14.

Even if accurate, however, Curran's assertion would not substantially affect either the finality or the importance of the decision below. Holding that the only organizations outside the statute's intrusive coverage are "*strictly* private clubs or institutions" means, at the very least, that the State can dictate the membership requirements of organizations serving political or religious purposes and other organizations with characteristics subject to the strongest First Amendment protections. Brief of the Boy Scouts of America as Amicus Curiae in support of Affirmance, filed in *Roberts v. The United States Jaycees,* No. 83-724, *prob. juris. noted,* 52 U.S.L.W. 3509 (U.S. January 9, 1984), at 18.

Moreover, exclusion of "*strictly* private" associations from the reach of the Unruh Act offers little guidance and less constitutional comfort. Simply stating that some unspecified body of "*strictly* private" groups remain unaffected by the ruling below begs the fundamental question. The State claims the right to label non-profit membership associations with the characteristics of the Boy Scouts as "business establishments" and hence to subject them to regulation of their membership criteria. That assertion of power threatens to erode an important federal policy—the constitutional right to freedom of association. That issue is not resolved simply by saying that an undefined class of associations different in some unknown ways from the Boy Scouts will not be covered by the challenged Act.

In a further effort to limit the significance of the decision below, Curran claims that, on the common law cause of action, the court below merely held that "one may not be arbitrarily expelled from an organization whose membership requirements . . . he has not violated. . . . " Motion To Dismiss at 9. There is nothing in the court's opinion, however, that states or implies that the

holding is so limited. The court nowhere even discussed whether or not Curran violated any membership requirement. Rather, the court held that, as a matter of substantive law, "an expulsion from an association on the basis of a person's status as a homosexual is both capricious and offensive to public policy" and hence violates California common law. JS App. at 8a. That ruling applies to all associations in California.

3. Curran cites other California state court decisions to suggest that "specialized institution[s]" may have "reasonable" regulations "rationally related to the services performed." Motion to Dismiss at 12. Even if that principle were superimposed on the decision below, it would not cure the decision's fundamental constitutional infirmity. A group protected by the freedom of association cannot be put to the burden of proving that its membership criteria are functionally related to some activity in which it engages. Such a test would turn the constitutional right on its head by requiring the citizens who are protected by the Constitution to justify the exercise of their rights, rather than requiring the State to carry its burden of showing a compelling justification for restricting those rights. In the absence of such proof by the State, an organization protected by the freedom of association should be able to adopt any membership criteria its members believe are appropriate. *See* Brief of the Boy Scouts of America as Amicus Curiae in Support of Affirmance, filed in *Roberts v. The United States Jaycees, supra,* at 16-17, 22, 27. Otherwise, the constitutional right is left with little content.

4. Despite Curran's unsupported assertion to the contrary, Motion to Dismiss at 14, the Court of Appeal's ruling will bar membership criteria based on gender, because "sex" is both a classification based on "status," and thereby subject to the same analysis under the

common law rule, and one of the classifications expressly barred under the Unruh Act. California Civil Code § 51. Similarly, Curran asserts without explanation that other federally chartered organizations with selective membership policies need not be affected by the court's ruling. Motion to Dismiss at 14-15. Curran does not explain why the Court of Appeal's decision would not apply to the many such organizations that exclude people on the basis of gender or other status classifications.

5. Finally, in his only oblique reference to the substantiality of the constitutional issues, Curran accuses the Council of being "grossly misleading" in its discussion of *Schwenk v. Boy Scouts of America,* 551 P.2d 465 (Or. 1976). Curran disputes the Council's statement that the Oregon court interpreted its public accomodations law as inapplicable to the Boy Scouts when confronted with these same constitutional objections. Motion To Dismiss at 15. In fact, however, as the dissenting opinion in *Schwenk* explicitly recognized, the Boy Scouts raised the very constitutional issues present in this case—freedom of association and the Supremacy Clause—in arguing that, if the Oregon public accommodations law were interpreted as requiring the Boy Scouts to admit girls, the statute would be unconstitutional. 551 P.2d at 475-76 (O'Connell, J., dissenting). Faced with those arguments, the Oregon Supreme Court avoided the constitutional conflicts by holding that the statute did not apply to the Boy Scouts' membership policies. The California court, by contrast, reached the opposite conclusion in interpreting its statute and thus squarely framed the substantive constitutional questions that are now before this Court.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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April 1984